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In The

Supreme Court of the United States

October Term, 1994

STATE OF CALIFORNIA, STATE OF NEVADA AND TAHOE REGIONAL PLANNING AGENCY,

Petitioners,

v.

TAHOE SIERRA PRESERVATION COUNCIL, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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148

QUESTIONS PRESENTED

Whether, in litigation brought under an interstate compact to challenge government regulations adopted under the terms of that compact, the applicable limitations period should be drawn from the express provisions of the compact itself rather than from other state or federal law.

Whether, in litigation brought under 42 U.S.C. section 1983 to challenge regulatory action taken to implement an interstate compact, *Wilson v. Garcia*, 471 U.S. 261 (1985) requires application of a state law-derived statute of limitations, as opposed to the Congressionally-approved statute of limitations prescribed by the compact itself.

PARTIES TO THE PROCEEDINGS

The States of California and Nevada, together with the Tahoe Regional Planning Agency (a bistate agency created by interstate compact), were the appellees in the consolidated proceedings below. The Tahoe Sierra Preservation Council was the lead appellant in both of those proceedings. Also appearing as appellants below were several hundred additional individuals, partnerships and corporations. Given their number, these parties are listed in the Appendix to this petition, beginning at page 53a.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 10

I. REVIEW IS NECESSARY TO RESOLVE A CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEALS AS TO THE APPROPRIATE STATUTE OF LIMITATIONS TO BE APPLIED IN LITIGATION BROUGHT UNDER AN INTERSTATE COMPACT. 11

II. THE PETITION RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT: THE APPROPRIATE STATUTE OF LIMITATIONS TO BE APPLIED IN LITIGATION BROUGHT UNDER INTERSTATE COMPACTS ENACTED PURSUANT TO THE COMPACT CLAUSE..... 16

III. THE DECISION BELOW FUNDAMENTALLY MISCONSTRUES AND CONFLICTS WITH THIS COURT'S DECISION IN *WILSON V. GARCIA* CONCERNING THE APPLICABLE STATUTE OF LIMITATIONS TO BE APPLIED IN SECTION 1983 CASES. 23

CONCLUSION 27

APPENDIX 1a

TABLE OF CONTENTS – Continued

Page

Opinion of the U.S. Court of Appeals for the Ninth Circuit, dated August 10, 1994 ..... 1a

Order of the U.S. Court of Appeals for the Ninth Circuit amending prior opinion, dated December 20, 1994 ..... 7a

Opinion of the U.S. District Court for the District of Nevada, dated December 9, 1992 ..... 9a

Opinion of the U.S. District Court for the District of Nevada, dated December 9, 1992 ..... 30a

Order of the U.S. Court of Appeals for the Ninth Circuit denying petition for rehearing and suggestion for rehearing *en banc*, dated November 2, 1994 ..... 49a

Judgment of the U.S. Court of Appeals for the Ninth Circuit, originally dated August 10, 1994, reissued November 15, 1994 ..... 51a

Listing of additional parties to the proceedings (Rule 14.1(b)) 53a

Tahoe Regional Planning Compact, P.L. 96-551, 94 Stat. 3233 (1980) 60a

(Partial) Listing of Interstate Compacts 104a

TABLE OF AUTHORITIES

Page

CASES

Azul-Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704 (9th Cir. 1992) cert. denied, ___ U.S. ___ 113 S. Ct. 1049 (1993) 22

City of South Lake Tahoe v. Tahoe Regional Planning Agency, 664 F.Supp. 1375 (E.D.Cal. 1987) 26

Creppel v. United States, 41 F.3d 627 (Fed.Cir. 1994) 22

Cuyler v. Adams, 449 U.S. 433 (1981) 23

Delaware River Commission v. Coburn, 310 U.S. 419 (1940) 23

Golden Gate Hotel Assn. v. City and County of San Francisco, 18 F.3d 1482 (9th Cir. 1994) 20

Halkias v. General Dynamics Corp., 31 F.3d 224 (5th Cir. 1994) 25

Hensler v. City of Glendale, 8 Cal.4th 1, 876 P.2d 1043, 32 Cal.Rptr.2d 244 (1994) 22

Hess v. Port Authority Trans-Hudson Corp., 809 F.Supp. 1172 (D.N.J. 1992) 13

Hess v. Port Authority Trans-Hudson Corp., 8 F.3d 811 (3d Cir. 1993) 13, 14

Hess v. Port Authority Trans-Hudson Corp., ___ U.S. ___, 115 S.Ct. 394 (1994) 13, 18

Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1977) 24

Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) 5, 11, 14

TABLE OF AUTHORITIES – Continued

Page

Lampf v. Gilbertson, ___ U.S. ___, 111 S.Ct. 2773 (1991) 25, 26

League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 507 F.2d 517 (9th Cir. 1975) cert. denied, 420 U.S. 974 (1975) 24

Lufkin v. McCallum, 956 F.2d 1104 (1992) 25

Morris v. Washington Metropolitan Area Transit Authority, 781 F.2d 218 (D.C. Cir. 1986) 24

Nebraska v. Central Interstate Low-Level Radioactive Waste Commission, 26 F.3d 77 (8th Cir. 1994) 15

NYSA-ILA Vacation & Holiday Fund v. Waterfront Commission of New York Harbor, 732 F.2d 292 (2d Cir. 1984) 24

Pavlak v. Church, 727 F.2d 1425 (9th Cir. 1984) 25, 26

Perez v. Seever, 869 F.2d 425 (9th Cir. 1989) cert. denied, 493 U.S. 860 (1989) 20

Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959) 23

Rao v. Port of New York Authority, 122 F.Supp. 595 (E.D.N.Y. 1954) aff'd 222 F.2d 362 (2d Cir. 1955) 14

Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 911 F.2d 1331 (9th Cir. 1990) 6

Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 938 F.2d 153 (9th Cir. 1991) 6

TABLE OF AUTHORITIES – Continued

Page

Taylor v. Regents of the University of California, 993 F.2d 710 (9th Cir. 1993) cert. denied, ___ U.S. ___, 114 S.Ct. 890 (1994) 20

Trimen Development Corp. v. King County, 124 Wash.2d 261, 877 P.2d 187 (1994) 22

United States v. Kubrick, 444 U.S. 111 (1979) 22

Walsh v. Port Authority Trans-Hudson Corp., 813 F.Supp. 1095 (D.N.J. 1993) 13

Wilson v. Garcia, 471 U.S. 261 (1985) ..... *passim*

WMATA v. One Parcel of Land, 706 F.2d 1312 (4th Cir. 1983) 24

UNITED STATES CONSTITUTION

Article I
§ 10 11

FEDERAL STATUTES

Federal Rules of Civil Procedure
Rule 10.1 10

Title 28, United States Code
§ 1254(1) 2

Title 42, United States Code
§ 1983 ..... 3, 7, 13, 19

§ 1988 25

§ 1988(a) 3

§ 2021d(a) 17

Title 45, United States Code
§ 56 14

TABLE OF AUTHORITIES – Continued

Page

Title 49, United States Code
§ 1301 26

STATE STATUTES

California Government Code
§ 66801 ..... 4, 11

New Jersey Statutes Annotated
§ 32:1-157 (West 1990) 13

New York Unconsolidated Laws
§ 7101 (McKinney 1979) 13

Nevada N.R.S. 277.200 ..... 5, 11

OTHER AUTHORITIES

Columbia River Gorge National Scenic Area Act
100 Stat. 4274 (1986) §§ 5(a), 15(b)(3) 15

Delaware River Basin Compact of 1961 75 Stat. 688
(1961) 18

Furgurson, "Lake Tahoe – Playing for High Stakes," National Geographic (March 1992) at 112 5

Interstate Compacts and Agencies (Council of State Governments 1983) 15, 17

New York-New Jersey Port Authority Compact
(42 Stat. 174 (1921)) 13

Susquehanna River Basin Compact P.L. 91-575
(1967) 18

Tahoe Regional Planning Compact P.L. 96-551, 94
Stat. 3233 (1980) 5

TABLE OF AUTHORITIES – Continued

Page

Tahoe Regional Planning Compact
Art. I(a)(9) 12

Art. I(b) 20

Art. V 5

Art. VI 5

Art. VI(j) 12, 21

Art. VI(j)(2)(B) 20

Art. VI(j)(4) 12, 20, 26

Strong, Tahoe: An Environmental History (U. Nebraska Press 1984) 5

V. Thursby, Interstate Cooperation: A Study of the Interstate Compact (1953) 18

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TAHOE SIERRA PRESERVATION COUNCIL, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

The State of California, State of Nevada and the Tahoe Regional Planning Agency respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The August 10, 1994 opinion of the Court of Appeals (App., *infra*, pp. 1a-7a), is reported at 34 F.3d 753. The December 20, 1994 Order of the Court of Appeals amending its earlier decision is reproduced at pages 7a-8a of the

Appendix to this petition. The November 2, 1994 Order of the Court of Appeals denying petitioners' petition for rehearing and suggestion for rehearing *en banc* is reproduced at pages 49a-50a of the Appendix. The opinions of the district court in these cases, subsequently consolidated on appeal, are reported at 808 F.Supp. 1474 and 808 F.Supp. 1484 (see App., *infra*, pp. 9a-29a and pp. 30a-48a, respectively).

JURISDICTION

The Court of Appeals entered its initial judgment on August 10, 1994. (App., *infra*, pp. 51a-52a.) Petitioners filed a timely petition for rehearing and suggestion for rehearing *en banc*. That petition and request were denied by the Court of Appeals on November 2, 1994. (See App., *infra*, at pp. 49a-50a.) The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Tahoe Regional Planning Compact, enacted by the States of California and Nevada and ratified by Congress, are set forth in full at pages 60a-103a of the Appendix. The statute of limitations contained in the Compact provides in pertinent part as follows:

> "Legal actions arising out of or alleging a violation of the provisions of this compact, of the regional plan or of an ordinance or regulation of the agency or of a permit or a condition of a

permit issued by the agency are governed by the following provisions:

. . . .

> "(4) A legal action arising out of the adoption or amendment of the regional plan or of any ordinance or regulation of the agency, or out of the granting or denial of any permit, shall be commenced within 60 days after final action of the agency . . . " (P.L. 96-551, 94 Stat. 3233, at Art. VI(j).)

42 U.S.C. section 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

42 U.S.C. section 1988(a) provides:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons of the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to

carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

STATEMENT OF THE CASE

This case concerns the applicable statute of limitations to be applied in federal litigation brought to challenge the actions of a bistate entity created pursuant to interstate compact. The U.S. Court of Appeals for the Ninth Circuit declined to apply the 60-day statute of limitations made applicable to such litigation under the express terms of the Tahoe Regional Planning Compact itself. Instead, the Court of Appeals relied upon this Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985) to borrow different, longer and variable statutes of limitations from state law, finding that the state statute of limitations displaces the shorter limitations period specifically contained in the compact.

In 1980, the States of California and Nevada enacted a revised Tahoe Regional Planning Compact ("the Compact"). (Cal. Government Code § 66801; Nevada N.R.S.

277.200.) The Compact was ratified by Congress on December 19, 1980. (P.L. 96-551, 94 Stat. 3233.) The 1980 Compact expressly supersedes an earlier version of the Tahoe Regional Planning Compact (P.L. 91-148, 83 Stat. 360) which was previously reviewed by this Court. (See *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979).) Both the 1980 Compact and its predecessor deal with the same general concern: preservation of the Lake Tahoe Basin, an internationally-renown area of unique beauty and ecological significance which is imperilled by environmental degradation and associated problems attributable to human development of the region. (Compact, Art. I; see generally, Strong, *Tahoe: An Environmental History* (U. Nebraska Press 1984); Furgurson, "Lake Tahoe – Playing for High Stakes," *National Geographic* (March 1992) at 112.)

The Compact creates petitioner Tahoe Regional Planning Agency ("TRPA"), a bistate entity charged with planning and regulating development within the Lake Tahoe Basin. TRPA's principal duty under the Compact is to enact and implement a regional plan for the Lake Tahoe Basin that will control development within the Tahoe Basin consistent with the region's documented environmental carrying capacity. (Compact, Arts. V, VI.) TRPA adopted its regional plan under the Compact in April 1984. That regional plan superseded two temporary ordinances, promulgated by TRPA in 1981 and 1983, which were intended to limit development during the interim period in which the 1984 regional plan was being formulated.

On June 25, 1984, respondents filed two separate but closely-related lawsuits: one in the U.S. District Court for

the District of Nevada, the other in the U.S. District Court for the Eastern District of California.[1] Both cases presented a facial, constitutional challenge to TRPA's 1984 regional plan. Specifically, respondents alleged in their original complaints that TRPA's adoption of its 1984 regional plan resulted in an unconstitutional taking of respondents' property without compensation, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. Both complaints named the States of California and Nevada as co-defendants along with TRPA.

Both district courts subsequently granted petitioners' motions to dismiss and motions for summary judgment. In separate appellate decisions, the U.S. Court of Appeals for the Ninth Circuit affirmed in part and reversed in part, for reasons not germane to the instant petition. (See *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, 911 F.2d 1331 (9th Cir. 1990); and *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, 938 F.2d 153 (9th Cir. 1991).) Respondents unsuccessfully petitioned this Court for certiorari in the former case, again on grounds irrelevant to this petition. (499 U.S. 943 (1991).)

On remand, respondents filed amended complaints in the District of Nevada (on October 28, 1991) and in the Eastern District of California (on March 27, 1992).

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[1] These lawsuits can best be described as massive joinder actions. The Tahoe Sierra Preservation Council was the lead plaintiff in each case. Also named as plaintiffs in each lawsuit were several hundred individuals, corporations and partnerships. The latter plaintiffs are identified in the appendix to this petition. App., pp. 53a-59a.

Respondents utilized that opportunity to expand significantly the scope of their original lawsuits by separately and facially challenging, in addition to the 1984 regional plan: a) the interim ordinances previously adopted by TRPA in 1981 and 1983; and b) TRPA's subsequent regional plan, adopted in 1987, which supersedes the original, 1984 version. Each amended complaint contained three causes of action. Two causes of action sought damages against TRPA directly under the U.S. Constitution for an alleged regulatory taking attributable to each of the above-described TRPA provisions. The third cause of action sought damages for the alleged deprivation of the same constitutionally-protected right, but under the provisions of the Federal Civil Rights Act, 42 U.S.C. section 1983.

After both cases were consolidated in the District of Nevada by stipulation of the parties, petitioners again moved to dismiss the cases. The district court granted those motions in separate opinions. (808 F.Supp. 1474 (D.Nev. 1992), reproduced at App., pp. 9a-29a; 808 F.Supp. 1484 (D.Nev. 1992), reproduced at App., pp. 30a-48a.) The district court held in pertinent part that:

> a) respondents' belated regulatory takings challenge to TRPA's 1981 and 1983 interim ordinances was time-barred under the 60-day statute of limitations expressly set forth in Article VI(j)(4) of the Compact;
>
> b) respondents' inverse condemnation claim against TRPA's 1984 regional plan failed under principles of causation (because that plan was enjoined by a separate federal court order, therefore never took effect, and was ultimately superseded by TRPA's 1987 regional plan); and

> c) respondents' newly-initiated attack on the 1987 regional plan was also barred by the Compact's 60-day statute of limitations, due to the fact that the 1987 regional plan was markedly different from the predecessor 1984 plan; because the new claim did not "relate back" to the date of the original complaints under Rule 15(c) of the Federal Rules of Civil Procedure; and because the challenge to the 1987 plan was not otherwise timely filed under the Compact's 60-day limitations period. (*Ibid.*)

Respondents appealed to the U.S. Court of Appeals for the Ninth Circuit. On appeal, respondents for the first time advanced the argument that the Compact's 60-day statute of limitations should not be applied to their regulatory takings claims. Instead, they contended, either no statute of limitations should be invoked or, alternatively, a different and longer statute of limitations should be borrowed from state law under the rule announced by this Court in *Wilson v. Garcia, supra.*

The Court of Appeals affirmed in part and reversed in part in a consolidated decision issued on August 10, 1994. (34 F.3d 753 (9th Cir. 1994), reproduced at App., pp. 1a-6a.) Judgment was entered on the same date. (App., pp. 51a-52a.) In its decision, the Ninth Circuit affirmed the district court judgment as to two of the three causes of action contained in each of respondents' amended complaints. The Court of Appeals concluded that "[b]y its terms, the [Tahoe Regional Planning Compact's] 60-day limitation applies to actions arising out of ordinances enacted by the TRPA." (App., p. 4a.) It applied that

statute of limitations to find time-barred respondents' direct constitutional challenges (as set forth in the amended complaints' first and second causes of action) to TRPA's 1981 and 1983 interim ordinances, as well as respondents' belated attack on the new, 1987 regional plan. (*Id.* at pp. 4a-5a.)[2]

Noting, however, that respondents had purported to bring one cause of action in each of their amended complaints under 42 U.S.C. section 1983, the Court of Appeals proceeded to conclude that under *Wilson v. Garcia, supra,* the Compact's 60-day limitations period should be ignored as to those claims, in favor of longer statutes of limitations borrowed from state law. The Ninth Circuit ultimately concluded that respondents' section 1983-based claim was not time-barred. (*Id.* at pp. 5a-6a.) Significantly, the effect of the Court of Appeals' latter ruling is to permit respondents to pursue their constitutional claims against both TRPA's 1981 and 1983 interim ordinances and its subsequent 1987 regional plan – all under the rubric of respondents' section 1983-based causes of action.[3]

Petitioners timely petitioned the Court of Appeals for rehearing and suggested that it grant rehearing *en banc.*

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[2] Petitioners do not seek review of the above-described portion of the Court of Appeals' decision in this petition.

[3] The Court of Appeals further addressed the district court's conclusion that respondents' attack on the 1984 regional plan was barred under causation principles. The Ninth Circuit held that the causation issue could not properly be resolved as a matter of law but, rather, required further evidentiary proceedings in the district court. *Id.* at 6a. Petitioners do not address or seek review of that portion of the decision below in this petition.

On November 2, 1994, the Court of Appeals issued its order denying the petition for rehearing, and similarly rejecting the suggestion for rehearing *en banc*. (*Id.* at pp. 49a-50a.)

On December 20, 1994, the Court of Appeals *sua sponte* ordered a technical revision to its August 10, 1994 opinion which does not materially affect either that opinion or this petition. (*Id.* at pp. 7a-8a.)

REASONS FOR GRANTING THE PETITION

The Court's granting of certiorari is warranted under Rule 10.1 for the following reasons: 1) to settle a conflict between the Second, Third and Ninth Circuits regarding the proper statute of limitations to be applied in litigation brought under an interstate compact ratified by Congress; 2) to resolve an important question of federal law not previously addressed by this Court, i.e., whether and to what extent a limitations period expressly contained in an interstate compact should be enforced in litigation brought under that compact; and 3) to correct the Ninth Circuit's erroneous application of principles articulated by this Court in *Wilson v. Garcia, supra*, where that application potentially affects interstate compact-related litigation nationwide.

I. REVIEW IS NECESSARY TO RESOLVE A CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEALS AS TO THE APPROPRIATE STATUTE OF LIMITATIONS TO BE APPLIED IN LITIGATION BROUGHT UNDER AN INTERSTATE COMPACT.

The opinion below, which disregards a statute of limitations expressly contained in an interstate compact, conflicts with two decisions of the U.S. District Court for the District of New Jersey which were subsequently affirmed by the U.S. Court of Appeals for the Third Circuit. The opinion below also conflicts with a long-standing decision of the U.S. District Court for the Eastern District of New York, subsequently affirmed by the Second Circuit.

1. Pursuant to the Compact Clause of the United States Constitution[4], the States of California and Nevada entered into an interstate compact in 1980 to protect and preserve the unique natural resources of the Lake Tahoe Basin. (Cal. Government Code § 66801; Nevada N.R.S. 277.200.) Congress ratified the Tahoe Regional Planning Compact later that same year. (P.L. 96-551, 94 Stat. 3233 (1980).)

The Lake Tahoe region is located along the California-Nevada border and encompasses an area of approximately 500 square miles. As this Court has previously noted, Lake Tahoe is "famed for its scenic beauty and pristine quality." (*Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 393, n.2 (1979)

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[4] Article I, § 10 of the Constitution provides in pertinent part: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . "

(quoting U.S. Senate report).) The Compact expressly recognizes the national significance of and federal interest in the region. (E.g., Art. I(a)(9).)

The Compact (reproduced at pp. 60a-103a of the Appendix) creates the bistate Tahoe Regional Planning Agency and directs TRPA to undertake planning and regulatory activities necessary to strike the appropriate balance between environmental protection on the one hand, and human development and enjoyment of the region on the other. Articles V and VI of the Compact further mandate TRPA to adopt ordinances and regulations necessary to accomplish those objectives. The centerpiece of TRPA's regulatory program is the regional plan it is required under the Compact to formulate for the Lake Tahoe Basin.

The Compact also contains detailed provisions specifying the manner in which judicial review may be obtained of regulatory decisions made by TRPA. (See Compact, Art. VI(j).) The key provision for purposes of this case is Article VI(j)(4), which expressly provides that any "legal action arising out of the adoption or amendment of the regional plan or of any ordinance or regulation of [TRPA] *shall be commenced within 60 days after final action by the agency.*" (Emphasis added.)

2. Notwithstanding this unambiguous limitations provision, the opinion below disregards in pertinent part the Compact's limitations period, in favor of an alternate statute of limitations derived from state law.

Respondents' parallel federal lawsuits seek to invalidate both TRPA's regional plan and two interim ordinances that had preceded it. Respondents' claim is that

these regulations, on their face, effected an unconstitutional taking of respondents' property.

Noting that, in each amended complaint, one of respondents' causes of action for a claimed regulatory taking had been brought under 42 U.S.C. section 1983, the Court of Appeals declined to apply and enforce the Compact's 60-day statute of limitations to those claims. Instead, the Ninth Circuit looked outside the Compact to different limitations periods, ultimately concluding that the section 1983-based causes of action were not time-barred. (App., pp. 5a-6a.)

3. This holding of the Ninth Circuit conflicts with previous rulings of the U.S. District Court for the District of New Jersey. Those rulings were, in turn, summarily affirmed by the U.S. Court of Appeals for the Third Circuit. The Court is well aware of those cases, inasmuch as it addressed a distinct issue raised by that litigation earlier this Term. (*Hess v. Port Authority Trans-Hudson Corp.*, ___ U.S. ___, 115 S.Ct. 394 (1994).)

In *Walsh v. Port Authority Trans-Hudson Corp.*, 813 F.Supp. 1095 (D.N.J. 1993) and *Hess v. Port Authority Trans-Hudson Corp.*, 809 F.Supp. 1172 (D.N.J. 1992), plaintiffs sought to recover damages for injuries incurred while working for the Port Authority Trans-Hudson Corporation ("PATH"), an entity created pursuant to interstate compact. The New York-New Jersey Port Authority Compact (42 Stat. 174 (1921)) contains an express limitations period of one year for suits brought against PATH in federal court. (See N.J. Stat. Ann. §§ 32:1-157, 32:1-163 (West 1990); N.Y. Unconsol. Laws §§ 7101, 7107 (McKinney 1979).) The plaintiffs in *Walsh* and *Hess* nevertheless

urged the court to disregard that compact's statute of limitations in favor of the three-year limitations provision contained in a separate federal statute, the Federal Employers' Liability Act ("FELA"). (See 45 U.S.C. § 56.)

The federal court declined to depart from the express language of the New York-New Jersey Compact in either case, finding the New York-New Jersey Port Authority Compact's one-year statute of limitations to be fully applicable. (*Walsh, supra,* 813 F.Supp. at 1098; *Hess, supra,* 809 F.Supp. at 1184-1185.)

On consolidated appeal to the U.S. Court of Appeals for the Third Circuit, the district court decisions were summarily affirmed. (*Hess v. Port Authority Trans-Hudson Corp.*, 8 F.3d 811 (3d Cir. 1993), *rev'd on other grounds,* ___ U.S. ___, 115 S.Ct. 394.)[5]

Other courts have similarly enforced statutes of limitation expressly incorporated in interstate compacts, rejecting claims that alternative, extra-compact limitations periods should be applied. In *Rao v. Port of New York*

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[5] This Court's recent decision in *Hess* dealt exclusively with another question raised in that litigation: the issue of PATH's immunity from suit under the Eleventh Amendment. The Court ultimately concluded that PATH is entitled to no such immunity. 115 S.Ct. at 404-406. While the conflicting compact/FELA statutes of limitation are noted in the Court's opinion (115 S.Ct. at 397), the question at issue here was neither presented by the petitions for certiorari in *Hess* nor addressed in the Court's opinion.

Of course, the Court previously held that petitioner TRPA is not immune from federal suit under the Eleventh Amendment in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 400-402 (1979).

Authority, 122 F.Supp. 595, 597 (E.D.N.Y. 1954), *aff'd* 222 F.2d 362 (2d Cir. 1955), for example, the U. S. District Court for the Eastern District of New York enforced the same one-year limitations period contained in the New York-New Jersey Port Authority Compact, spurning arguments that a longer, state law-derived statute of limitations period should be followed instead. (*Cf. Nebraska v. Central Interstate Low-Level Radioactive Waste Commission*, 26 F.3d 77 (8th Cir. 1994) (applying Central Interstate Low-Level Radioactive Waste Compact's 60-day statute of limitations to defeat state's federal suit against interstate commission created by compact).)

4. The Court of Appeals' decision below presents a serious conflict vis-a-vis these earlier federal decisions. Absent review by this Court, regulatory actions by TRPA will remain subject to judicial challenge for periods far in excess of those contemplated by the California and Nevada legislatures, or by Congress. The important mandates of the Compact could well be compromised by such uncertainty and delay.

The inter-circuit conflict can be expected to become even more pronounced and disruptive in the future, given the plentiful and steadily-increasing number of interstate compacts adopted by all 50 states to address a broad spectrum of regional problems which do not respect state borders. (For a compendium of currently-effective interstate compacts, see *Interstate Compacts and Agencies* (Council of State Governments 1983); see also, representative listing of interstate compacts set forth at App., pp. 104a-110a. Many of these compacts contain their own, specific limitations periods. (E.g., Columbia River Gorge National Scenic Area Act, 100 Stat. 4274

(1986), §§ 5(a), 15(b)(3) (directing states of Oregon and Washington to create Columbia River Gorge Commission by interstate agreement, and setting 60-day statute of limitations as to litigation brought thereunder.)) The decision below raises considerable uncertainty as to whether and under what circumstances those statutes of limitations will be respected and enforced by the judiciary. If litigants and courts are free to ignore with impunity compact-prescribed statutes of limitations in favor of provisions engrafted from external state or federal laws, the important objectives underlying this broad array of interstate agreements will be compromised.

In order to foster uniformity among the states and federal courts in the enforcement and implementation of interstate compacts negotiated under the Compact Clause, the Court should grant this petition and resolve the conflict.

II. THE PETITION RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT: THE APPROPRIATE STATUTE OF LIMITATIONS TO BE APPLIED IN LITIGATION BROUGHT UNDER INTERSTATE COMPACTS ENACTED PURSUANT TO THE COMPACT CLAUSE.

There is another, crucial reason why certiorari should be granted in this case. The petition raises the important federal question of the appropriate statute of limitations to be applied in litigation brought in connection with interstate compacts executed by the several states and ratified by Congress. In those cases where a compact

itself contains a specific statute of limitations, that provision should be respected and enforced by the courts. The decision below erred in failing to do so.

1. The twentieth century has witnessed rapid growth in the use of interstate compacts by the states as a means of addressing regional concerns. As the Council of State Governments noted over a decade ago:

> "The growth of compact use in this century . . . has been striking. Since 1920, over 140 additional interstate compacts have been negotiated, with over 100 of those coming since World War II. The key to this compact growth has almost certainly been the increasing complexity of society, and the demand for creative governmental approaches to its problems." (*Interstate Compacts and Agencies* (Council of State Governments 1983) at p. vi.)

In recent years, agreements negotiated by the states under the Compact Clause have been utilized to secure interstate cooperation in a diverse set of subject areas including nuclear energy, natural resource management, health care, education, transportation, detainers, child welfare, law enforcement and corrections, taxation and disaster relief. (For a detailed listing of such interstate compacts, organized by subject area, see App., pp. 104a-110a.)

Congress has itself fostered the use of interstate compacts in a variety of ways. For example, it has enacted federal legislation which encourages states to implement federal mandates through the enactment of such compacts. (See, e.g., Low-Level Radioactive Waste Policy Act of 1980, 42 U.S.C. § 2021d(a) (encouraging states to enter into interstate compacts as a means of dealing with low-

level radioactive waste disposal on a regional basis).) Additionally, Congress has in certain cases acted to make the federal government itself a member of the compact body, along with the compacting states. (E.g., Delaware River Basin Compact of 1961, 75 Stat. 688 (1961); Susquehanna River Basin Compact, P.L. 91-575 (1967).)

This Court recognized the critical importance of interstate compacts to the nation's welfare as recently as its decision in *Hess v. Port Authority Trans-Hudson Corp.*, ___ U.S. ___, 115 S.Ct. 394 (1994). There it observed:

> "Bistate entities['] . . . mission is to address ' " 'interests and problems that do not coincide nicely either with the national boundaries or with State lines' " ' – interests that ' " 'may be badly served or not served at all by the ordinary channels of National or State political action.' " ' " (115 S.Ct. at 400 (quoting V. Thursby, *Interstate Cooperation: A Study of the Interstate Compact* 5 (1953).)

2. One of the principal virtues of the compact mechanism is that it allows compacting states to address a particular problem through the use of a consolidated, consistent set of rules and policies. Compact provisions governing judicial review of administrative decisions made or acts taken pursuant to interstate agreement are a prominent application of this necessary objective. And the need for certainty and uniformity is perhaps nowhere so compelling as with regard to compacts' statutes of limitations. Illustrative, again, is the recently-decided *Hess* case, in which one *amici*, the Railway Labor Executives' Association, aptly noted:

> "[T]he labor organizations are keenly interested in assuring that PATH employees who may reside in New Jersey and prefer to bring an action in a district court in their home state, are entitled to the same statute of limitations as their counterparts who live in New York and prefer to bring an action in a district court in their home state. In short, as representatives of PATH employees, the members of the RLEA are acutely concerned about the disparate treatment that occurs among employees when there is a lack of uniformity in the application of the law as it applies to employees of the same employer." (Brief of Railway Labor Executives' Assn. as *amicus curiae* in *Hess, supra,* at p. 2.)

The need for consistent treatment applies with equal force in the case of a statute of limitations, negotiated by the compacting states and ratified by Congress, governing judicial review of regulatory decisions by bistate agencies such as TRPA.

3. The implications of a contrary ruling are starkly illustrated by reference to the practical impact of the decision below, if left unreviewed. Through enactment of Article VI(j)(4) of the Compact, the States of California and Nevada – together with Congress – reflected their desire to apply a single, 60-day statute of limitations to legal challenges brought against TRPA in response to its regulatory decisions. Yet the Ninth Circuit's opinion, relying on a strained interpretation of 42 U.S.C. section 1983 (see part III, *infra*), yields a very different and unfortunate result.

4. The Ninth Circuit has itself interpreted this Court's opinion in *Wilson v. Garcia, supra,* 471 U.S. 261, to

compel application of a one-year statute of limitations to section 1983 cases brought in California, and a two-year limitations to apply to such cases filed in Nevada.[6] The net effect of the Court of Appeals' decision in this case is to have the statutes of limitations applicable to the same regulatory decision of TRPA vary dramatically depending solely upon the particular U.S. district court in which a plaintiff chooses to bring suit. And, since venue rules under the Compact are quite liberal (see Art. VI(j)(2)(B)), the applicable limitations period will in large part be subject to the unilateral manipulation of the plaintiff via creative exercises in forum-shopping.

This, in turn, has several untoward consequences. First, it injects into Compact-related litigation a degree of capriciousness which the Compact drafters and Congress expressly sought to avoid through the enactment of Art. VI(j)(4).[7] Second, the decision below creates a

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[6] See, e.g., *Golden Gate Hotel Assn. v. City and County of San Francisco*, 18 F.3d 1482, 1485 (9th Cir. 1994); *Taylor v. Regents of the University of California*, 993 F.2d 710, 711 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 890 (1994) (finding one year limitations period applicable in § 1983 cases in California under *Garcia* principles); *Perez v. Seever*, 869 F.2d 425, 426 (9th Cir. 1989), *cert. denied*, 493 U.S. 860 (1989) (two year limitations period applicable in Nevada under *Garcia*).

[7] Indeed, the Compact was enacted to resolve the disparate results which had previously arisen from application of varying sets of state and local statutes and regulations. Two of the Compact's stated purposes – as is the case with most agreements consummated under the Compact Clause – are the avoidance of multiple jurisdictions acting at cross-purposes with one another, and an end to conflicting state court rules and decisions. Reflecting these policies, Article I(b) of the Compact declares: "*In order to enhance the efficiency and governmental effec-*

considerable amount of uncertainty in TRPA's decision-making process. Since TRPA is not subject to either the federal Administrative Procedure Act or its state analogues, the first notice TRPA is likely to receive of a section 1983-based legal claim is when the federal complaint and summons are served upon it.

Third, the chilling effect upon TRPA's deliberative process is considerable, inasmuch as the lower court decision would allow constitutional challenges – conceivably accompanied by substantial claims for damages – to be brought to challenge TRPA plans and ordinances up to two years after their enactment (and perhaps even longer in the case of an "as-applied" challenge). Such a result could reduce the value of or even render worthless prior expenditures made by TRPA, the compacting states and other governmental entities to implement such TRPA programs.

Fourth, such a result is particularly unfair to the property owners, interest groups and members of the general public who come to rely upon TRPA's rules and policies over time, only to find them challenged in belated litigation. The settled expectations of those persons, derived from development projects or property acquisitions specifically facilitated by TRPA regulations,

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tiveness of the [Lake Tahoe] region, it is imperative that there be established a Tahoe Regional Planning Agency with the powers conferred by this compact . . . " (Emphasis added.) Similarly, Article V(c) of the Compact requires the regional plan adopted by TRPA to be a "single enforceable plan . . . " The judicial review provisions contained in Article VI(j) of the Compact, of which the limitations provision is a key element, were designed with precisely the same ends in mind.

could be disrupted through belated litigation brought years after those regulations have been adopted.

This Court, lower federal courts and state tribunals have repeatedly stressed the value and need for relatively short statutes of limitations designed to promote the prompt prosecution of litigation involving a variety of federal constitutional and statutory claims. (See, e.g., *Unites States v. Kubrick*, 444 U.S. 111, 117 (1979) (Federal Tort Claims Act); *Creppel v. United States*, 41 F.3d 627 (Fed.Cir. 1994) (inverse condemnation claim); *Trimen Development Corp. v. King County*, 124 Wash.2d 261, 877 P.2d 187, 195 (1994) (same); *Hensler v. City of Glendale*, 8 Cal.4th 1, 27-28, 876 P.2d 1043, 1060-1061, 32 Cal.Rptr.2d 244 (1994), *pet. for cert. pending* (applying state 60-day statute of limitations to regulatory takings claim).)

Finally, the ineluctable legacy of the decision below will be to encourage disaffected parties to recast their legal theories as constitutional claims within the rubric of section 1983, thereby circumventing the Compact's 60-day statute of limitations (and similar provisions contained in other compacts) in favor of the far lengthier limitations periods prescribed under section 1983. The net result is effectively to negate the Compact's and analogous statutes of limitations.[8]

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[8] The effect of such a rule is especially pronounced in those circuits which have concluded that section 1983 is the exclusive procedural basis for raising federal constitutional claims against state, regional and local governments in federal court. See, e.g., *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1049 (1993).

Allowing such a result in the face of an unambiguous Compact limitations provision is compelled neither by applicable law nor logic. The instant case presents the Court with a compelling opportunity to confirm the sanctity and enforceability of statutes of limitations which are – as here – express provisions of interstate compacts.

III. THE DECISION BELOW FUNDAMENTALLY MISCONSTRUES AND CONFLICTS WITH THIS COURT'S DECISION IN *WILSON V. GARCIA* CONCERNING THE APPLICABLE STATUTE OF LIMITATIONS TO BE APPLIED IN SECTION 1983 CASES.

The decision below fundamentally misconstrues this Court's decision in *Wilson v. Garcia, supra,* insofar as that case pertains to the proper statute of limitations to be applied in litigation brought under interstate compacts. Given the multiplicity and broad subject matter of such compacts currently in effect across the nation (see App., pp. 103a-110a), the lower court's opinion is likely to generate significant mischief in the federal courts. This represents another, distinct reason why this Court should grant certiorari.

1. The first critical point is the legal status of interstate agreements such as the Compact. This Court has repeatedly declared that interstate compacts take on the attributes of *federal,* rather than state, law by virtue of their ratification by Congress. (See, e.g., *Cuyler v. Adams,* 449 U.S. 433, 439-440 (1981); *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275, 278-279 (1959); *Delaware River Commission v. Coburn,* 310 U.S. 419, 427 (1940).) Numerous circuit court decisions have so concluded.

(E.g., *Morris v. Washington Metropolitan Area Transit Authority*, 781 F.2d 218, 220 (D.C. Cir. 1986); *NYSA-ILA Vacation & Holiday Fund v. Waterfront Commission of New York Harbor*, 732 F.2d 292, 297 (2d Cir. 1984); *WMATA v. One Parcel of Land*, 706 F.2d 1312, 1317-1319 (4th Cir. 1983).) Indeed, the Ninth Circuit has expressly and repeatedly held that the very Compact at issue in this case has been transformed into federal law by virtue of Congressional approval. (See *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1358 (9th Cir. 1977), *aff'd in part and rev'd in part sub nom. on other grounds, Lake Country Estates, supra*, 440 U.S. 391; *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 507 F.2d 517, 523 (9th Cir. 1975), *cert. denied*, 420 U.S. 974 (1975).)

2. Contrary to the apparent interpretation of the Court of Appeals, this Court held in *Wilson v. Garcia* that: a) choice of the applicable statute of limitations in actions brought under section 1983 is a question of *federal* law; b) in the absence of a federally-decreed time limitation, the "settled practice" has been to adopt a local statute of limitations as the federal rule; and c) federal courts are required to rely on state law only to the extent it is not inconsistent with *federal* law. (471 U.S. at 266-267.) Noting that *Garcia* principally involved the second analytical step listed above (*id.* at 268), the Court there proceeded to hold that in the absence of relevant federal law, federal courts should apply the relevant personal injury limitations period, derived from the state in which the particular federal tribunal is located. (*Id.* at 271-273.)

The key point, however – one apparently lost on the Court of Appeals – is that "resort to state law . . . should not be undertaken before principles of federal law are

exhausted." (*Wilson v. Garcia, supra*, 471 U.S. at 268 (citing and relying on 42 U.S.C. § 1988); see also, *Lufkin v. McCallum*, 956 F.2d 1104, 1108 n.10 (1992) (citing *Garcia* and 42 U.S.C. § 1988 in applying federal, rather than state-derived, statute of limitations principles in § 1983 action).) It is only "[i]f no suitable federal rule exists" that application of state law should be considered. (*Garcia* at 267.[9])

3. The specific statute of limitations contained in the Compact, by virtue of its ratification by Congress, represents just such a federal law. That provision therefore supersedes and makes unnecessary the second step of the *Garcia* analysis – application of the California or Nevada personal injury limitations period.

In *Lampf v. Gilbertson*, ___ U.S. ___, 111 S.Ct. 2773, 2778 (1991), this Court recognized that "when the operation of a state limitations period would frustrate the policies embraced by federal enactment, this Court has looked to federal law." The Court went on in *Lampf* to discuss the relevant factors involved, one of which it determined to be geographical considerations. (*Id.* at 2779; *cf. Halkias v. General Dynamics Corp.*, 31 F.3d 224, 235-237 (5th Cir. 1994) (applying federal, rather than state limitations period citing, *inter alia*, the need for a uniform federal rule and forum-shopping problems).) Similarly, in *Pavlak v. Church*, 727 F.2d 1425, 1427-1428 (9th Cir. 1984), the Ninth Circuit itself correctly determined that "[w]here a

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[9] *Garcia*'s further admonition, that a state statute of limitations should only be applied in federal litigation if that state law is not "inconsistent with the Constitution and laws of the United States" (*id.* at 267), is also directly applicable to the present case.

federal statute of limitations is directly applicable to the facts, is the most analogous statute of limitations, and provides a reasonable opportunity to present civil rights claims, it is the proper statute of limitations to be applied."

The analysis set forth in *Lampf, Pavlak,* et al. similarly applies in the present case. Rather than erroneously apply a state-derived limitations period under the second prong of the *Garcia* analysis, the Court of Appeal should have looked to the *federal* policies and rules embodied in Article VI(j)(4) of the Compact. Properly viewed, respondents' section 1983-based regulatory takings claim is subject to – and time-barred by – the 60-day statute of limitations expressly set forth in the Compact itself.

4. Finally, it could conceivably be argued that the section 1983 limitations rule enunciated in *Garcia,* when contrasted with the limitations period set forth in Article VI(j)(4) of the Compact, presents a conflict between competing federal statutes of limitation. A closely analogous argument was advanced in *City of South Lake Tahoe v. Tahoe Regional Planning Agency,* 664 F.Supp. 1375 (E.D.Cal. 1987), where it was claimed that the federal Airline Deregulation Act, 49 U.S.C. § 1301 et seq., preempted the Compact with respect to regulation of local airport operations. The federal court rejected that argument, noting that the Compact itself constituted federal law which was: a) enacted by Congress later in time than the deregulation statute; b) more specific in its subject matter; and c) limited to a narrower geographic area. Accordingly, the court held, the Compact controls to the extent of any conflict with the other federal legislation. (664 F.Supp. at

1377.) Petitioners submit that precisely the same analysis is apposite in the present case.

In sum, the decision below misconstrues this Court's opinion in *Wilson v. Garcia* in such a way as to pose a substantial threat not only to the Compact, but also to the countless other interstate compacts in effect nationwide which contain their own specific statutes of limitations. This represents another compelling reason under Rule 10.1 why review by the Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 1995

The TAHOE SIERRA PRESERVATION COUNCIL, INC., et al., Plaintiffs-Appellants,

v.

The TAHOE REGIONAL PLANNING AGENCY, et al., Defendants-Appellees
(Two Cases).

Nos. 93-15113, 93-15114.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 10, 1994.

Decided Aug. 10, 1994.

Property owners brought actions against Tahoe Regional Planning Agency (TRPA) to challenge ordinances, regulations, and prohibitions against development. Following remand, 911 F.2d 1331 and 938 F.2d 153, the United States District Court for the District of Nevada, 808 F.Supp. 1474, 808 F.Supp. 1484, Edward C. Reed, Jr., J., entered judgment for Agency. Property owners appealed. The Court of Appeals, Noonan, Circuit Judge, held that: (1) where facial challenges were made to Agency's ordinance and resolution, claims accrued on dates those measures were adopted; (2) amendments containing claims based on plan adopted by Agency could not be treated as relating back to initial complaint based on previous plan; (3) statute of limitations applicable to property owners' § 1983 claims was not 60-day special limitations period of compact which created TRPA; and (4) district court's dismissal of § 1983 claim on the pleadings on ground of causation was premature.

Affirmed in part, reversed in part, and remanded.

Lawrence L. Hoffman, Hoffman, Lien & Faccinto, Tahoe City, CA, for plaintiffs-appellants.

Gary A. Owen, Crowell, Susich, Owen & Tackes, Carson City, NV, for defendants-appellees.

Appeals from the United States District Court for the District of Nevada.

Before: NOONAN, and T.G. NELSON, Circuit Judges, and EZRA,* District Judge.

NOONAN, Circuit Judge:

The Tahoe Sierra Preservation Council, Inc. (TSPC) appeals two judgments of the district court, consolidated on this appeal, in favor of The Tahoe Regional Planning Agency (TRPA) and the states of California and Nevada. The cases focus on regulations adopted by the TRPA in its efforts to protect the environment of the Lake Tahoe Basin. The principal issue presented is the effect of a special statute of limitations pleaded in bar of TSPC's actions. We affirm in part, reverse in part and remand for trial.

PROCEEDINGS

The earlier history of this litigation is set out in TSPC v. TRPA, 911 F.2d 1331 (9th Cir.1990), cert. denied, 499 U.S. 943, 111 S.Ct. 1404, 113 L.Ed.2d 459 (1991), (TSPC 1) involving property owners on the Nevada side of the

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* The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

Lake Tahoe Basin and in TSPC v. TRPA, 938 F.2d 153 (9th Cir.1991) (TSPC 2) involving property owners on the California side. In each instance we partially affirmed and partially reversed orders of the district court and remanded. After remand, TSPC filed an amended complaint in each case. TRPA moved to dismiss on the ground that the actions were time-barred.

The basis for TRPA's motions was Article VI(j)(4) of the Compact Between the States of California and Nevada creating the TRPA. The article reads as follows:

> A legal action arising out of the adoption or amendment of the regional plan or of any ordinance or regulation of the agency, . . . shall be commenced within 60 days after final action by the agency.

Only this statute of limitations was pleaded by TRPA.

TSPC's claims related to four separate time periods. The first two are these:

> 1. On June 25, 1981 TRPA adopted Ordinance 81-5 setting out certain provisional regulations for the use of the affected land. (The 1981 Ordinance).
>
> 2. On August 23, 1983 TRPA enacted Resolution 83-21 setting out further provisional regulations. (The 1983 Resolution).

TSPC filed its original complaint, in June 1984, challenging these two actions of TRPA. Two more actions by TRPA followed:

3. On April 26, 1984 Ordinance 81-5 was made permanent by TRPA enacting a Regional Plan (The 1984 Plan). On May 1, 1984, in response to a suit brought by

the State of California, the federal court for the Eastern District of California enjoined TRPA from carrying out the plan and inter alia from approving any building projects. The district court in our case ruled that this federal injunction prevented the Regional Plan from causing any harm to TSPC.

4. On June 15, 1987 TRPA adopted a new Regional Plan that was "markedly different from the 1984 Plan it replaced." TSPC I, 911 F.2d at 1334. (The 1987 Plan). TSPC filed its amended complaints in 1991 and 1992. The district court ruled that the 60-day time limitation barred the amended complaints and that TSPC would not be permitted to relate them back to its 1984 complaints.

Holding that three of the four claims of TSPC were subject to the 60-day statute of limitations and that no harm was caused by the 1984 Plan that had been enjoined, the district court entered judgment for the defendants. TSPC appeals.

ANALYSIS

1. Application of the 60-day limitation. By its terms, the 60-day limitation applies to actions arising out of ordinances enacted by the TRPA. As TSPC made facial challenges to Ordinance 81-5 and Resolution 83-21, its claims accrued on the dates these measures were adopted. Azul-Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704, 705 (9th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 1049, 122 L.Ed.2d 357 (1993). Accordingly, TSPC's takings claims are barred by their failure to have been brought within 60 days of the adoption of the 1981 Ordinance and the 1983 Resolution.

Similarly, TSPC's taking challenges to the 1987 Regional Plan, which were included in the amended complaints filed in 1991 and 1992, are equally barred. This court has already determined that the 1987 Plan was markedly different from its 1984 predecessor. TSPC I, 911 F.2d at 1333; TSPC II, 938 F.2d at 155. Accordingly, the 1987 Plan cannot be considered the same transaction or occurrence as the 1984 Plan, within the meaning of Fed.R.Civ.P. 15(c). Percy v. San Francisco General Hospital, 841 F.2d 975, 978 (9th Cir.1988). In addition, defendants were not put on notice as to the extent of plaintiffs' claims under the 1987 Plan until four years after that Plan was enacted. Accordingly, amendments containing claims based on the 1987 Plan cannot be treated as relating back to the initial complaint. The takings claims concerning the 1987 Plan which were brought more than 60 days after the cause of action accrued are time-barred.

Plaintiffs argue that in two recent Supreme Court temporary takings cases the regulations at issue were amended during the appeal but in neither case was the plaintiff required to file a new lawsuit. Lucas v. South Caroline Coastal Council, ___ U.S. ___, ___, 112 S.Ct. 2886, 2891, 120 L.Ed.2d 798 (1992); First Lutheran Church v. Los Angeles County, 482 U.S. 304, 313 n. 7, 107 S.Ct. 2378, 2384-85 n. 7, 96 L.Ed.2d 250 (1987). As the regulations in the present case were replaced and not amended, plaintiffs' citations are inapposite.

2. The § 1983 claim. TSPC, however, brought one claim under 42 U.S.C. § 1983 for the violation of its civil rights by the actions of TRPA in adopting the 1981 Ordinance, the 1983 Resolution, the 1984 Plan and the 1987 Plan. As to § 1983 it is established law that there is a

single state statute of limitation to be applied. Wilson v. Garcia, 471 U.S. 261, 275, 105 S.Ct. 1938, 1946-47, 85 L.Ed.2d 254 (1985). As expressed by the Supreme Court, that statute is to apply to "all § 1983 claims." Id. at 275, 105 S.Ct. at 1947. All § 1983 claims, of course, include § 1983 claims based on takings. See Golden Gate Hotel Ass'n v. City and County of San Francisco, 18 F.3d 1482, 1486 (9th Cir.1994). Obviously, the single state statute of limitations to be applied in all § 1983 actions cannot be the special 60-day period provided by the Compact. The defendants did not plead any other statute of limitations except the 60-day one. Failing to plead affirmatively any other statute of limitations, they cannot now rely on any other. No part of TSPC's § 1983 claim is time-barred.

3. Causation. TSPC in its § 1983 claim contended that it was harmed by the 1984 Regional Plan. The district court dismissed this claim on the pleadings because it found that the federal district court's injunction had supervened and inflicted the harm. However, a question of causation is preeminently a question of fact, to be decided after trial. Lies v. Farrell Lines, Inc., 641 F.2d 765, 770 (9th Cir.1981). It was premature to hold that TRPA inflicted no harm because of the injunction. Accordingly, TSPC's § 1983 claim as to the 1984 Plan is also appropriately remanded for further proceedings.

Plaintiffs ask for attorneys' fees, but prematurely; they have not yet achieved any success on the merits.

AFFIRMED in part, REVERSED in part and REMANDED for further proceedings in accordance with this opinion.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE TAHOE SIERRA PRESERVATION COUNCIL, INC., et al., *Plaintiffs-Appellants,* v. THE TAHOE REGIONAL PLANNING AGENCY, et al., *Defendants-Appellees.*	No. 93-15113 D.C. No. CV-84-00257-ECR

THE TAHOE SIERRA PRESERVATION COUNCIL, INC., et al., *Plaintiffs-Appellants,* v. THE TAHOE REGIONAL PLANNING AGENCY, et al., *Defendants-Appellees.*	No. 93-15114 D.C. No. CV-84-00257-ECR **ORDER**

(Filed Dec. 20, 1994)

Before: John T. Noonan, Jr., and Thomas G. Nelson, Circuit Judges, David A. Ezra,* District Judge.

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* The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

ORDER

The opinion filed on August 10, 1994 is amended as follows:

At slip op. p.9213, second ¶ 1.5, insert preceding "As to § 1983 it is established . . . ", "The section 1983 claim is proper against TRPA. *Lake Country Estates v. Tahoe Regional Planning Agency,* 440 U.S. 391, 399 & n.13 (1979)."

TAHOE SIERRA PRESERVATION COUNCIL, INC., et al., Plaintiffs,

v.

TAHOE REGIONAL PLANNING AGENCY, et al., Defendants.

No. CV-R-84-257-ECR.

United States District Court, D. Nevada.

Dec. 9, 1992.

Property owners brought action against Tahoe Regional Planning Agency (TRPA) challenging ordinances, regulations, and prohibitions against development. The District Court, Edward C. Reed, Jr., J., held that takings claims were barred by limitations.

Motion to dismiss amended complaint granted.

Hoffman, Lien, Faccinto & Spitzer, by Lawrence L. Hoffman, Robert Damon Spitzer and Gregg R. Lien, Tahoe City, CA, for plaintiffs.

Richard M. Frank, California Dept. of Justice, Sacramento, CA, for State of Cal.

Deputy Atty. Gen., Environmental Div., Carson City, NV, for State of Nev.

Gary A. Owen, Carson City, NV, for TRPA.

ORDER

EDWARD C. REED, Jr., District Judge.

This consolidated case (now before this Court on a Motion to Dismiss) arises from two cases filed on June 25, 1984 by the Tahoe Sierra Preservation Council ("TSPC") and the several hundred individually-named plaintiffs who contended that Tahoe Regional Planning Agency's (TRPA) 1984 Regional Plan, and its predecessor interim Ordinance 81-5,[1] had denied them all "economically viable use" of their properties – primarily vacant but lawfully-zoned single-family homesites. The TSPC plaintiffs planned to build permanent or vacation single-family

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[1] It is helpful to consider this case in light of four distinct time periods: Period I – June 25, 1981 through August 28, 1983 when TRPA Ordinance 81-5 prohibiting development on the properties was in effect. A limited exception was made to this prohibition available only to the Nevada property owners of Class 1, 2, and 3 lots (not available to Nevada property owners of SEZ lots). Case-by-case consideration and exceptions were potentially available to these plaintiffs during this time. Period II – August 28, 1983 through April 26, 1984. During this period a complete moratorium (Resolution 81-23) was instituted and no property could be developed and the case by case review previously available to the Nevada property owners had expired. Period III – April 26, 1984 to June 25, 1987. The 1984 plan was approved at this time; however, the federal district court for the Eastern District of California enjoined the TRPA from approving any projects under the plan pursuant to a suit brought by the State of California against TRPA alleging that the plan violated the 1980 Compact. In effect, the District Court prevented the Plan from being implemented. Period IV – June 25, 1987 TRPA adopted a new regional plan (the Plan includes rights to appeal land classifications, transfer rights, and the right to seek amendment to the plan) still in effect.

homes on these lots located in the Tahoe Basin. Plaintiffs owning property on the Nevada side of the Lake Tahoe Basin filed their action in this Court. Those owning property on the California side, filed their action in the United States District Court for the Eastern District of California.[2] This Order addresses only the Motion to Dismiss the First Amended Complaint filed by the Nevada-side plaintiffs following *TSPC I* (document # 117); and only the facts relevant to Nevada half of this dispute will be reviewed. (The order addressing the California-side plaintiffs is a separate document to be filed contemporaneously with this Order).

HISTORY

The original Complaints filed on June 25, 1984 contained nearly identical allegations and legal claims. In both cases, the plaintiffs sought the following relief from all defendants: 1) Just Compensation for the taking of their property; 2) declaratory and injunctive relief based upon the due process, equal protection, and takings clauses of the United States Constitution; and 3) damages under 42 U.S.C. 1983 for deprivation of their constitutionally-protected civil rights. The district courts each granted motions to dismiss/summary judgment in favor

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[2] The Nevada-side plaintiffs and the California-side plaintiffs both consist of two groups: those who own land in area classified as Stream Environment Zones (the SEZ plaintiffs) and those who own land in Class 1, 2, and 3 areas (the "Class 1, 2 and 3 plaintiffs").

of the defendants.[3] The defendants appealed the decisions to the Ninth Circuit.[4]

Between the time of the District Court decisions and oral argument before the Ninth Circuit, the Supreme Court announced its decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). In *First English*, the Supreme Court held that "temporary takings which deny a landowner all the use of his property are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English*, 482 U.S. at 318, 107 S.Ct. at 2388.[5] The rulings by the Court of Appeals were, in part, guided by this decision.

The Ninth Circuit decided the case appealed from the District Court of Nevada on August 27, 1990 (*TSPC I*)[6]

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[3] The named defendants were TRPA, the States of California and Nevada, and the individual members of the TRPA Governing Board. The individual members of TRPA's 1984 Governing Board have subsequently been voluntarily dismissed by plaintiffs.

[4] On appeal the plaintiffs did not contest the dismissal of the monetary damage claims as to the States of California and Nevada, which had been dismissed based on Eleventh Amendment immunity grounds.

[5] The Ninth Circuit also found that continuing to distinguish those agencies with the power of condemnation (which can appropriately be held liable in damages for inverse condemnation) from those without such power (immune from liability for inverse condemnation) would "unavoidably conflict with the reasoning of *First English.*" *TSPC I* at 1341.

[6] "TSPC I" hereinafter refers to the Nevada-side decision by the Ninth Circuit *Tahoe Sierra Preserv. v. Tahoe Reg. Planning Agency*, 911 F.2d 1331 (9th Cir.1990).

and the case appealed from the Eastern District of California on June 10, 1991 (*TSPC II*).[7] In *TSPC I* the Circuit Court held that (1) some claims were unripe; (2) TRPA was not immune from liability for inverse condemnation; and (3) owners of property subject to prohibition against development had a claim for reimbursement of assessments independent of any claim for taking of land itself.

Specifically, the Court in *TSPC I* dismissed all claims for declaratory and injunctive relief as being moot in view of TRPA's subsequent adoption of its 1987 Regional Plan (distinguishing declaratory and injunctive relief as providing no benefit to the plaintiffs as compared to compensatory damages, still of value, for a temporary taking). The Court allowed the plaintiffs to seek damages for deprivation of the plaintiffs' right to enjoy certain public improvements for which they had previously paid assessments.[8] Most important to the matter at hand, by finding that the TRPA was not immune from liability and that a right to compensation for "temporary taking" exists, the Court also reinstated a portion of the Nevada plaintiffs' claims for just compensation as a result of the

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[7] "TSPC II" hereinafter refers to the California-side decision of the Ninth Circuit *Tahoe Sierra Preserv. v. Tahoe Reg. Planning Agency*, 938 F.2d 153 (9th Cir.1991).

[8] The Court of Appeals limited this cause of action to assessments actually paid to TRPA. Because no assessments were paid to TRPA in this case, no claims have been raised pursuant to the ruling on this point. *TSPC II* found that property owners are entitled to pursue a refund from the agency that collected the assessments for improvements during a temporary taking. While TRPA did not collect assessments in this case, assessments may have been collected by a local improvement district.

alleged regulatory takings. Partnered with this finding was the Circuit Court's reinstatement of the plaintiffs' Civil Rights Act claims to the extent they were based upon denial of Just Compensation relating to the alleged regulatory takings.

The ruling by the Court of Appeals is complicated however by the affirmation of the District Court's dismissals due to ripeness and mootness. With regard to the alleged regulatory takings arising from TRPA's adoption of its 1984 Plan (Period III), Judge Reinhardt found the claims to be *un*ripe, Judge Fletcher found the claims to be moot, and Judge Kozinski in a dissenting opinion, found the claims to be ripe for review. Plaintiffs encourage this Court to consider the Appellate Court's finding in *TSPC II* where the position of Judge Kozinski – that the plaintiffs' claims as to the 1984 Plan are in fact ripe for review despite the fact that the plaintiffs did not seek to amend the plan – was unanimously adopted. There is no difference in the facts between the Nevada plaintiffs and the California plaintiffs with regard to the 1984 Plan; however, this Court chooses to follow the law-of-the-case doctrine. Despite the inconsistency of the Appellate Court rulings, the per curium opinion in *TSPC I* dismissed the claims. This Court is not free to disregard the ruling in *TSPC I* that ripeness standards preclude the Nevada plaintiffs from pursuing a takings claim pertaining to the 1984 Regional Plan. The alternative theory of futility pursued by the plaintiffs is irrelevant in light of the injunction ordered by the Eastern District Court of California during this time and is discussed later in this Order.

The Court of Appeals also upheld the dismissal of claims as they pertained to the Nevada Class 1, 2, and 3 plaintiffs for the 26-month period from June 25, 1981 through August 28, 1983 (Period I) because these plaintiffs did not pursue the available "case-by-case exception." The Court held that the claims were not ripe and affirmed the dismissal. Plaintiffs' attempt to now claim that case-by-case review would have been "futile" cannot change the ruling by the Court of Appeals. The futility doctrine is not a new theory created by the Appellate Court. The plaintiffs should have made this argument at the time the claims were being considered by the Court. This Court will not consider cursory and untimely arguments on issues that have already been decided. Dismissal of the claims pertaining to Nevada Class 1, 2, and 3 plaintiffs for the period from June 25, 1981 through August 28, 1983 (Period I) will not be reconsidered.

Pursuant to the rulings by the Ninth Circuit in *TSPC I* and *TSPC II* and the above discussion, the only claims that may be appropriately included in the Plaintiffs' First Amended Complaint are limited to Just Compensation for the regulatory taking of property and damages for deprivation of constitutionally-protected civil rights pursuant to the Federal Civil Rights Act. These claims are further limited by the previous dismissal of allegations arising from Period I as to the Nevada Class 1, 2, and 3 plaintiffs and from Period III as to all the Nevada plaintiffs. This leaves only Period I as to the SEZ plaintiffs, Period II as to all the plaintiffs, and Period IV as to all the plaintiffs as relevant for further consideration in this case.

CASE ON REMAND

After receiving permission from this Court, the Nevada-side plaintiffs filed their First Amended Complaint on October 28, 1991 (the California-side plaintiffs filed their First Amended Complaint on March 27, 1992). The First Amended Complaint states three claims for relief. The first claim is applicable to the SEZ plaintiffs alleging a regulatory taking of the plaintiffs' properties resulting from the prohibitions contained in TRPA's 1984 Plan and predecessor "interim moratoria,"[9] and continued in force and effect by TRPA's 1987 Plan. In the second claim for relief, the Class 1, 2, and 3 plaintiffs seek the identical relief. In the third claim for relief, all plaintiffs seek additional damages for deprivation of their Constitutionally-protected civil rights pursuant to the Federal Civil Rights Act. The gravamen of the Complaint is that the TRPA's regulation, at face value and without reference to the any of the regulations application to any particular parcel, effects an unconstitutional taking of property. This is to be contrasted with an "as applied" takings claim, in which it is alleged that the particular impact of the regulation upon a given parcel raises an inverse condemnation claim. Facial challenges are appropriate for disposition by pre-trial motion. *See e.g., Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987).

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[9] Plaintiffs use "interim moratoria" to include Period I (June 25, 1981 through August 28, 1983 – Ordinance 81-5) and Period II (August 28, 1983 through April 26, 1984 – Resolution 83-21).

It is apparent from the First Amended Complaint that the plaintiffs have taken a broad view of the Court's decisions in *TSPC I* and *TSPC II*. The plaintiffs have coupled their understanding of the appellate decisions with a liberal reading of *First English, supra* and *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) to expand their takings claims in the Amended Complaint. Rather than realizing that limited claims, further limited by certain facts, were found to be potentially viable by the Appellate Court, the plaintiffs have made new allegations and ignored the limitations prescribed.

In response to the First Amended Complaints, both the TRPA and the State of California filed Motions to Dismiss (documents #140-141 and #145-146). The motion on behalf of California incorporated all of the TRPA's arguments and TRPA joined the State of California in its Motion to Dismiss. Plaintiffs opposed the Motions and defendants replied. The matter is now ripe for the Court's decision.

A court may grant a motion to dismiss for failure to state a claim on which relief can be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Adult Video Assoc. v. Barr* 960 F.2d 781, 784 (9th Cir.1992). A court may only look to the facts alleged in the complaint when deciding whether to grant a 12(b)(6) motion. *Id.* All material facts alleged in the complaint must be taken as true and construed in the light most favorable to the nonmoving party. *Amfac Mortgage Corp. v. Arizona Mall of Tempe* 583 F.2d 426, 430 (9th Cir. 1978). However, it is not proper for the Court to assume that

"the pleader can prove facts that he has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated General Contractors v. California State Council,* 459 U.S. 519, 526, 103 S.Ct. 897, 902, 74 L.Ed.2d 723 (1983).

Keeping in mind the deference which this Court is bound to give to the plaintiffs allegations, each claim will be considered in the context of the relevant time period of the takings claims.

Period I (June 25, 1981 – August 28, 1983 – Ordinance 81-5)

The allegations of a regulatory taking arising from the period of June 25, 1981 through August 28, 1983 (Ordinance 81-5 period) will be discussed first. As discussed above, the plaintiffs' claims are limited to the SEZ plaintiffs during this period. This Court has previously found, and the Appellate Court affirmed, that due to the availability of case-by-case review with respect too the Class 1, 2, and 3 plaintiffs their claims are not ripe (and can never be ripe because review was never sought while the regulation was in effect). The defendants have raised a legitimate statute of limitations defense. A 60-day statute of limitation is imposed by the Compact for any legal action arising out of any ordinance of the agency. Tahoe Regional Planning Compact (Public Law 96-551, 94 Stat. 3233; Cal.Gov.Code §§ 66800 & 66801; N.R.S. § 277.190 & § 277.200 Art. VI(j)(4)).[10] The TRPA took final action to

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[10] The statute reads in pertinent part: "A legal action arising out of the adoption or amendment of the regional plan or of any ordinance or regulation of the agency, or out of the granting

enact the ordinance alleged to constitute a facial taking on June 25, 1981. The first complaint was not filed in this case until 1984.

Plaintiffs' efforts to save themselves from the requirement of filing prompt claims are not persuasive. Some takings do occur gradually and incrementally thereby extending the appropriate time period for filing an inverse condemnation suit until the consequences of the event are fully known. *See United States v. Dickinson*, 331 U.S. 745, 746-750, 67 S.Ct. 1382, 1383-85, 91 L.Ed. 1789 (1947) (physical taking ultimately took place due to flooding caused by Federal Government damming a river – plaintiff permitted to file complaint when flooding damage could be determined); *Pierpont Inn, Inc. v. State*, 70 Cal.2d 282, 74 Cal.Rptr. 521, 449 P.2d 737 (1969) (plaintiff permitted to file complaint after property was appropriated for a freeway but prior to completion of construction project).

The case at hand arises from a claim against a regulatory taking. There has been no continuous physical invasion of the plaintiffs land culminating in a taking. It was clear from the day Ordinance 81-5 was adopted that development was prohibited as to the SEZ plaintiffs. A facial takings claim based upon Ordinance 81-5 became actionable upon the date that TRPA took final action to enact the ordinance. There is no reason for the plaintiffs' delay in alleging a regulatory taking as a result of this Ordinance. Moreover, the defendants have not waived

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or denial of any permit, shall be commenced within 60 days after final action by the agency."

their right to raise this defense. There has been no adverse ruling by any of the Courts regarding the limitation of action issue as it pertains to Ordinance 81-5. In fact, during the litigation of this case, the Courts have consistently shown an overt unwillingness to reach decisions regarding the statute of limitations issues that had not been raised while alerting the parties and this Court that statute of limitations issues may be relevant. As there were no adverse rulings below, there was no basis for cross appeal and accordingly no waiver of the defense has occurred. "Even if an appellee does not file a cross appeal . . . he may defend the judgment in his favor with any argument that is supported by the record, regardless of whether it was ignored by the Court." (9 Moore's Federal Practice (2d ed. 1992) ¶ 204.11[3] at 4-47). TSPC's regulatory takings claims arising from Period I (Ordinance 81-5) are barred by the 60-day limitation of actions imposed by the Compact and are dismissed.

Period II (August 28, 1983-April 26, 1984 – Resolution 83-21)

As to the second relevant period, Resolution 83-21 was in effect from August 28, 1983 through April 26, 1984 (the eight-month moratorium). The 60-day statute of limitation applies to this period as well. A temporary resolution falls within the scope of the statute of limitation applies to this period as well. A temporary resolution falls within the scope of the statute of limitations provided in the Compact. The Compact expressly states that "any regulation" of the Agency is subject to a 60-day

statute of limitations.[11] There is no logical argument as to why Board Resolution 83-21 would not fall within the scope of this statute. However, the Compact further expresses that any legal actions shall take place 60 days after "final action" by the agency. Resolution 83-21 was temporary in nature – admittedly an interim measure.[12] The notion that a "temporary resolution" amounts to "final action" deserves discussion.

There is little authority as to what constitutes "final action" on the part of TRPA. Previous discussions have centered around permit-specific disputes. *See Cal. Tahoe Regional Planning v. Sahara Tahoe Corp.*, 504 F.Supp. 751 (D.Nev.1980) (Court held that when TRPA treated a second application for permit for parking garage as request to reconsider Agency's previous denial of the request and then denied the request for a rehearing, the Agency took a "final action"); *Sederquist v. Tahoe Regional Planning Agency*, 652 F.Supp. 341 (D.Nev.1987). (Court held that TRPA's conditional approval of construction, rather than issuance of final permit, was "final action" within meaning of Compact providing for permit expiration three years after date of final action.)

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[11] See note 10 above.

[12] The TRPA Governing Board temporarily suspended issuance of permits for projects because a serious legal question arose concerning TRPA's ability to continue project review and approval beyond August 26, 1983 without having an amended plan in effect. Article V(c) of the Compact required the amended plan to be adopted within one year after the environmental thresholds were established. The environmental thresholds had been established on August 26, 1982.

Defendants assert that final action occurs at the time of adoption. Determination of when final action occurred as to the moratorium is crucial because if TRPA's construction is applied, then the plaintiffs are time-barred from any claim of a facial taking during this period. However, if it can be argued that a temporary resolution implementing a moratorium, does not constitute a final action, then the plaintiffs may be able to save this claim.

Interpretation given a statute by the agency charged with its administration is entitled to deference from the courts, *Thomas v. Peterson*, 753 F.2d 754, 762 (9th Cir.1985). It has already been established that the term "final action" is ambiguous. *See Sederquist*, 652 F.Supp. 341, 345. In the case at hand it could be interpreted to mean the Board's adoption of Resolution 83-21 or it could be interpreted to mean the final adoption of the amended plan following the Board's interim measure. If the court determines that legislation is ambiguous, the question is whether the agency's interpretation is a reasonable one, consistent with the statute's overall purpose. *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). If TRPA's interpretation is reasonable, then its interpretation controls. These legal principles are incorporated into the Compact. 1980 Compact, Article VI(j)(5).

Despite its temporary nature (8 months) the policy and effect of the Resolution was clear – no development permitted. The resolution was neither ambiguous nor its application inconsistent. The day the Board adopted the Resolution it took final action as to what development could occur prior to the adoption of the 1987 Plan. Further, finding the adoption of a resolution as final action is

consistent with *Sederquist, supra* where the conditional approval, although an interim measure, was found to constitute final action. Finally, the TRPA's interpretation of the adoption as "final action" is in accord with the implied purpose of Article VI(j) of the Compact to place a reasonable time-bar on actions. TRPA's interpretation of "final action" as to the adoption of Resolution 83-21 is reasonable. Consequently, TSPC's claims based upon Period II Resolution 83-21 are time-barred and dismissed.

Period III (April 26, 1984-June 25, 1987 – 1984 Plan and Court Injunction)

The third relevant time period (1984 Plan and the court ordered injunction) has been discussed above. Plaintiffs have no valid claims relevant to this time period as they have been previously dismissed by this Court and the Court of Appeals as being unripe. Moreover, the orders of the federal district court for the Eastern District of California enjoining TRPA from implementing the plan prevent TSPC from having a legitimate cause of action with relation to this period. This Court need not address the plaintiffs new assertion – that seeking an amendment to the plan would have been "futile" and therefore the ripeness defense is without merit – due to the district court's injunction during this time. California Federal District Court's orders enjoining TRPA from implementing the plan prevent TSPC from having a legitimate cause of action with relation to this period. This Court need not address the plaintiffs new assertion – that seeking an amendment to the plan would have been "futile" and therefore the ripeness defense is without merit – due to

the injunction by the District Court of Eastern California.[13]

The Court of Appeals specifically retained this issue for this Court. "We leave it to the district court to determine whether the intervening injunction prevented the 1984 Plan from causing any harm to the plaintiffs." *TSCP II* at 157. TSPC's taking challenge to the 1984 Regional Plan must fail because that plan was enjoined and never implemented, hence the requisite causation between the 1984 Plan and TSPC's purported injury is lacking as a matter of law. The injunction ordered by the federal court prevented the 1984 Plan from ever taking effect. TRPA was enjoined from granting any development or building permit. Because the plan was never put into effect it could not have caused a taking. The claim fails for lack of causation. *See Carpenter v. Tahoe Regional Planning Agency,* 804 F.Supp. 1316 (D.Nev.). TSPC's claims for relief arising from Period III are dismissed.

Period IV (June 25, 1987-present – 1987 Plan)

The 1987 Plan encompasses the last relevant time period to be addressed. Claims arising under this plan are also dismissed. The conclusory allegation that the 1987 Plan is merely a continuation of the 1984 Plan and other regulations that allegedly amount to a taking is not persuasive to this Court even in the deferential light the

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[13] The State of California filed suit against TRPA on April 26, 1984 alleging that the 1984 Plan violated the Compact. Pursuant to this suit, the federal district court for the Eastern District of California ordered a preliminary injunction, preventing TRPA from authorizing any development. The injunction was extended through July 5, 1987.

Court must use in evaluating the plaintiffs claims. This action was originally filed in 1984 long before the 1987 Plan was in effect.

Raising allegations against TRPA on the basis of the 1987 Plan runs afoul of the statute of limitations. "An amendment of a pleading relates back to the date of the original pleading when . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading . . . " Fed.R.Civ.P. Rule 15(c)(2). When a plaintiff attempts to allege an entirely different transaction by amendment, Rule 15(c) will not authorize relation back. 6A. Wright, Miller & Kane, *Federal Practice and Procedure* § 1497 (2d ed. 1990). The TRPA's regulatory scheme embodied by the 1987 Plan is "markedly different from the 1984 Plan it replaced." *TSPC I* at 1334. As a result, the enlarged lawsuit now brought by TSPC rests on a different factual basis than those claims which survived from the original complaints. Amendments to complaints alleging claims arising from different contracts, different patents and separate violations do not "relate" back to the original complaint. Amendments that merely correct technical deficiencies or expand or modify the facts alleged in the earlier pleading meet the Rule 15(c) test and will relate back.

Because the rationale of the relation back rule is to ameliorate the effect of the statute of limitations[14] rather than to promote the joinder of claims and parties, the standard for determining whether amendments qualify

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[14] The Court notes that the time period for filing such an action is now barred by the 60 day statute of limitation for actions against the 1987 Plan.

under Rule 15(c) is not simply an identity of transaction test; although not expressly mentioned in the rule, the courts also inquire into whether the opposing party has been put on notice regarding the claim raised by the amended pleading. *Id.* In this case the allegations of taking pursuant to the 1987 Plan do not rest on the same general conduct, transaction or occurrence as the earlier claims. Nor does the fact that plaintiffs were pursuing taking claims in 1984 put the plaintiffs on notice that six years later (and approximately four years after the adoption of the plan at issue) an entirely different plan would be attacked as constituting a facial taking.

While Rule 15(a) does place an additional burden on the defendants in this case to have filed a separate complaint against the TRPA with regard to its 1987 plan, the alternative is to place an additional burden on the plaintiff – the burden of defending a new claim after 6 years of litigation centered around distinctly different claims and facts. The plaintiffs arguments of inconvenience are well taken; however, they do not weigh heavier than the rational behind Rule 15. Nor does justice require that this Court give leave to the amendment with regard to the new claims arising from the 1987 Plan. The plaintiffs' concern that the defendants would have "squealed like stuck pigs" had they (the plaintiffs) sought to file amended complaints while the matter was on appeal presents a colorful image but an unconvincing argument. Requiring the plaintiff to file a separate complaint against the TRPA for the 1987 [sic] does not amount to piecemeal litigation. The 1987 Plan is completely different. It is not merely an amended 1984 Plan without substantive changes (compare with *Tollis v. San Bernardino County*, 827

F.2d 1329 (9th Cir, 1987)) nor is a continuing process of a physical intrusion (compare with *United States v. Dickinson, supra*) nor does the 1987 Plan merely add a variance provision to the original statute (compare with *Lucas v. South Carolina Coastal Council, supra*).

The Ninth Circuit by mentioning the 1987 plan in its mootness analysis of certain claims did not open the door for claims arising from the Plan to be included in the Amended Complaints. If anything, the Court's affirmation of the dismissal of claims for declaratory and injunctive relief from the 1984 Plan because they were mooted by the 1987 Plan, demonstrates the Courts recognition that an entirely new statutory scheme was in place. A claim based upon an entirely different regulatory plan cannot be added to an existing complaint. The 1987 Plan was developed from discussions lasting over two years in a "consensus building workshop" initiated by TRPA and designed to include the broadest possible range of private and governmental interests and viewpoints. Moreover, the 1987 Plan could not be considered a continuation of the 1984 Plan because the 1984 Plan never went into effect as a result of the District Court of California's order enjoining the TRPA from implementing the plan.

While the Court dismisses the claims arising from the 1987 Plan on the basis of Rule 15 and the time-bar, it is also noted that claims in respect to the 1987 Plan would not be ripe until the plaintiffs avail themselves of the mechanisms in the 1987 Plan (e.g. challenging the IPES Scores, exploration of development transfer, and amendment to the plan). Plaintiffs must avail themselves of the options available as a prerequisite to any claim against

TRPA. TSPC's claims based upon the 1987 Plan are dismissed because they are not properly joined, do not relate back to the 1984 Plan and are now time-barred by the 60-day statute of limitations and are not ripe even if they had been validly asserted.

CONCLUSION

The Court of Appeals in *TSPC I* and *TSPC II* found that a temporary takings claim can exist and should compensated even after the period of the taking has passed. The Circuit Court relied on *First English* for this finding and now *Lucas* adds support to such a claim. However, the Circuit Court did not render any decisions as to potential statute of limitations defenses, the effect of the court injunction during the 1984 Plan, or the ripeness or appropriateness of any the claims arising from the 1987 Plan. Plaintiffs attempted to simplify this very complex matter by focusing their arguments on liberal readings of the two new Supreme Court cases and a broad reading of the Court of Appeals' limited rulings. Nevertheless, plaintiffs claims cannot survive a Motion to Dismiss.

As to plaintiffs First Claim for Relief (SEZ plaintiffs), The claim arising from Period I is time-barred and dismissed. The claim arising from Period II is time-barred and dismissed. The claim arising from Period III lacks the requisite causation and is dismissed. The claim arising from Period IV was made in violation of Fed.R.Civ.P. Rule 15, is time-barred, is not ripe, and is dismissed.

As to plaintiffs' Second Claim for Relief (Class 1, 2, and 3 plaintiffs). The claim arising from Period I was

dismissed and affirmed on appeal on the basis of ripeness. The claim arising from Period II is time-barred and dismissed. The claim arising from Period III lacks the requisite causation and is dismissed. The claim arising from Period IV was made in violation of Fed.R.Civ.P. Rule 15, is time-barred, is not ripe and is dismissed.

As to plaintiffs' Third Claim for Relief (SEZ and Class 1, 2, and 3 plaintiffs) the claim was limited to the extent it was based on the claims of denial of Just Compensation. No basis for the claim exists in light of the dismissal of both claims One and Two as to Periods I, II, III and IV. Claim Three is dismissed.

IT IS, THEREFORE, HEREBY ORDERED that defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (document #117) is GRANTED. The Clerk shall enter judgement accordingly.

TAHOE SIERRA PRESERVATION COUNCIL, INC., et al., Plaintiffs,

v.

TAHOE REGIONAL PLANNING AGENCY, et al., Defendants.

No. CV-R-84-257-ECR.

United States District Court, D. Nevada.

Dec. 9, 1992.

Property owners brought action against Tahoe Regional Planning Agency (TRPA) challenging ordinances, regulations, and prohibitions against development. The United States District Court for the Eastern District of California, Edward J. Garcia, J., dismissed some claims. Appeal was taken. The Court of Appeals, Beezer, Circuit Judge, 938 F.2d 153, affirmed in part, reversed in part and remanded. The United States District Court for the District of Nevada, Edward C. Reed, Jr., J., held that claims were barred by limitations.

Motion to dismiss amended complaint granted.

Hoffman, Lien, Faccinto & Spitzer, by Lawrence L. Hoffman, Robert Damon Spitzer and Gregg R. Lien, Tahoe City, CA, for plaintiffs.

Richard M. Frank, California Dept. of Justice, Sacramento, CA, for State of Cal.

Deputy Atty. Gen., Environmental Div., Carson City, NV, for State of Nev.

Gary A. Owen, Carson City, NV, for TRPA.

ORDER

EDWARD C. REED, Jr., District Judge.

This consolidated case[1] (now before this Court on a Motion to Dismiss) arises from two cases filed on June 24, 1984 by the Tahoe Sierra Preservation Council ("TSPC") and the several hundred individually-named plaintiffs who contended that Tahoe Regional Planning Agency's (TRPA) 1984 Regional Plan, and its predecessor interim Ordinance 81-5[2], had denied them all "economically viable use" of their properties – primarily vacant but

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[1] This case and a case originating in the District Court of Nevada shared almost identical facts and claims and were consolidated in the interest of justice pursuant to a motion by all parties (document #123) and an Order by this Court (document #132).

[2] It is helpful to consider this case in light of four distinct time periods: Period I – June 25, 1981 through August 28, 1983 when TRPA Ordinance 81-5 prohibiting development on the properties was in effect. A limited exception was made to this prohibition available only to the Nevada property owners of Class 1, 2, and 3 lots (not available to any of the California Plaintiffs). Case-by-case consideration and exceptions were potentially available to these plaintiffs during this time. Period II – August 28, 1983 through April 26, 1984. During this period a complete moratorium (Resolution 81-23) was instituted and no property could be developed and the case by case review previously available to the Nevada Property owners had expired. Period III – April 26, 1984 to June 25, 1987. The 1984 plan was approved at this time; however, the federal district court for the Eastern District of California enjoined the TRPA from approving any projects under the plan pursuant to a suit brought by the State of California against TRPA alleging that the plan violated the 1980 Compact. In effect, the District Court prevented the Plan from being implemented. Period IV – June 25, 1987 TRPA adopted a new regional plan (the Plan includes rights to appeal land classifications, transfer rights, and the right to seek amendment to the plan) still in effect.

lawfully-zoned single-family homesites. The TSPC plaintiffs planned to build permanent or vacation single-family homes on these lots located in the Tahoe Basin. Plaintiffs owning property on the Nevada side of the Lake Tahoe Basin filed their action in this Court. Those owning property on the California side, filed their action in the United States District Court for the Eastern District of California.[3] This Order addresses only the Motion to Dismiss the First Amended Complaint filed by the California-side plaintiffs following *TSPC II* (document # 135a); and only the facts relevant to the California half of this dispute will be reviewed. (The order addressing the Nevada-side plaintiffs is a separate document to be filed contemporaneously with this Order).

HISTORY

The original Complaints filed on June 214, 1984 contained nearly identical allegations and legal claims. In both cases, the plaintiffs sought the following relief from all defendants: 1) Just Compensation for the taking of their property; 2) declaratory and injunctive relief based upon the due process, equal protection, and takings clauses of the United States Constitution; and 4) damages under 42 U.S.C. 1983 for deprivation of their constitutionally-protected civil rights. The district courts each granted motions to dismiss/summary judgment in favor

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[3] The Nevada-side plaintiffs and the California-side plaintiffs both consist of two groups: those who own land in area classified as Stream Environment Zones (the SEZ plaintiffs) and those who own land in Class 1, 2, and 3 areas (the "Class 1, 2, and 3 plaintiffs").

of the defendants.[4] The defendants appealed the decisions to the Ninth Circuit.[5]

Between the time of the District Court decisions and oral argument before the Ninth Circuit, the Supreme Court announced its decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). In *First English*, the Supreme Court held that "temporary takings which deny a landowner all the use of his property are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English*, 482 U.S. at 318, 107 S.Ct. at 2388.[6] The rulings by the Court of Appeals were, in part, guided by this decision.

The Ninth Circuit decided the case appealed from the Eastern District of California on June 10, 1991 (*TSPC II*)[7]

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[4] The named defendants were TRPA, the States of California and Nevada, and the individual members of the TRPA Governing Board. The individual members of TRPA's 1984 Governing Board have subsequently been voluntarily dismissed by plaintiffs.

[5] On appeal the plaintiffs did not contest the dismissal of the monetary damage claims as to the State of California and Nevada, which had been dismissed based on Eleventh Amendment immunity grounds.

[6] The Ninth Circuit also found that continuing to distinguish those agencies with the power of condemnation (which can appropriately be held liable in damages for inverse condemnation) from those without such power (immune from liability for inverse condemnation) would "unavoidably conflict with the reasoning of *First English.*" *TSPC I* at 1341.

[7] "TSPC II" hereinafter refers to the California-side decision of the Ninth Circuit *Tahoe Sierra Preserv. v. Tahoe Reg. Planning Agency*, 938 F.2d 153 (9th Cir.1991).

and the case appealed from the District Court of Nevada on August 27, 1990 (*TSPC I*)[8]. In *TSPC II* the Circuit Court held that (1) TRPA was not immune from suit; (2) Claims for damages were not mooted by adoption of new regional plan; and (3) claims for temporary taking were ripe.

Specifically, the Court in *TSPC II* dismissed all claims for declaratory and injunctive relief as being moot in view of TRPA's subsequent adoption of its 1987 Regional Plan (distinguishing declaratory and injunctive relief as providing no benefit to the plaintiffs as compared to compensatory damages, still of value, for a temporary taking). The Court allowed the plaintiffs to seek damages for deprivation of the plaintiffs' right to enjoy certain public improvements for which they had previously paid assessments.[9] Most important to the matter at hand, by finding that TRPA was not immune from liability and that a right to compensation for "temporary taking" exists, the Court also reinstated the California plaintiffs' claims for just compensation as a result of the alleged regulatory takings. Included in the reinstated claims were those

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[8] "TSPC I" hereinafter refers to the Nevada-side decision by the Ninth Circuit. *Tahoe Sierra Preserv. v. Tahoe Reg. Planning Agency*, 911 F.2d 1331 (9th Cir.1990).

[9] In *TSPC I* the Ninth Circuit limited this cause of action to assessments actually paid to TRPA. Because no assessments were paid to TRPA in this case, no claims have been raised pursuant to the ruling on this point. *TSPC II* found that property owners are entitled to pursue a refund from the agency that collected the assessments for improvements during a temporary taking. While TRPA did not collect assessments in this case, assessments may have been collected by a local improvement district.

claims arising from Period III. Although the Court in *TSPC I* affirmed the dismissal of these claims to the extent they were not ripe as to the Nevada Plaintiffs, in this case the Court of Appeals held the claims were ripe (stating that Plaintiffs need not seek an amendment to the plan in order to make their claims against the Plan ripe). Partnered with this finding was the Circuit Court's reinstatement of the plaintiffs' Civil Rights Act claims to the extent they were based upon denial of Just Compensation relating to the alleged regulatory takings.

Pursuant to the rulings by the Ninth Circuit in *TSPC II*, the only claims that may be appropriately included in the Plaintiffs' First Amended Complaint are limited to Just Compensation for the regulatory taking of property and damages for deprivation of constitutionally-protected civil rights pursuant to the Federal Civil Rights Act.

After receiving permission from this Court, the California-side plaintiffs filed their First Amended Complaint on March 27, 1992 (the Nevada-side plaintiffs filed their First Amended Complaint On October 28, 1991). The First Amended Complaint states three claims for relief. The first claim is applicable to the SEZ plaintiffs alleging a regulatory taking of the plaintiffs' properties resulting from the prohibitions contained in TRPA's 1984 Plan and predecessor "interim moratoria,"[10] and continued in force and effect by TRPA's 1987 Plan. In the second claim for

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[10] Plaintiffs use "interim moratoria" to include Period I (June 25, 1981 through August 28, 1983 – Ordinance 81-5) and Period II (August 28, 1983 through April 26, 1984 – Resolution 83-21).

relief, the Class 1, 2 and 3 plaintiffs seek the identical relief. In the third claim for relief, all plaintiffs seek additional damages for deprivation of their Constitutionally-protected civil rights pursuant to the Federal Civil Rights Act. The gravamen of the Complaint is that the TRPA's regulation, at face value and without reference to the [sic] any of the regulations application to any particular parcel, effects an unconstitutional taking of property. This is to be contrasted with an "as applied takings claim, in which it is alleged that the particular impact of the regulation upon a given parcel raises an inverse condemnation claim. Facial challenges are appropriate for disposition by pre-trial motion. *See e.g., Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987).

It is apparent from the First Amended Complaint that the plaintiffs have taken a broad view of the Court's decisions in *TSPC I* and *TSPC II*. The plaintiffs have coupled their understanding of the appellate decisions with a liberal reading of *First English, supra and Lucas v. South Carolina Coastal Council,* ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) to expand their takings claims in the Amended Complaint. Rather than realizing that limited claims, further limited by certain facts, were found to be potentially viable by the Court of Appeals, the plaintiffs have made new allegations and ignored the limitations prescribed.

In response to the First Amended Complaints, both the TRPA and the State of California filed Motions to Dismiss (documents # 104-141 and # 145-146). The motion on behalf of California incorporated all of the

TRPA's arguments and TRPA joined the State of California in its Motion to Dismiss. Plaintiffs opposed the Motions and defendants replied. The matter is now ripe for the Court's decision.

A court may grant a motion to dismiss for failure to state a claim on which relief can be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Adult Video Assoc. v. Barr* 960 F.2d 781, 784 (9th cir. 1992). A court may only look to the facts alleged in the complaint when deciding whether to grant a 12(b)(6) motion. *Id.* All material facts alleged in the complaint must be taken as true and construed in the light most favorable to the nonmoving party. *Amfac Mortgage Corp. v. Arizona Mall of Tempe* 583 F.2d 426, 430 (9th cir. 1978). However, it is not proper for the Court to assume that "the pleader can prove facts that he has not alleged or that the defendants have violated the. . . . laws in ways that have not been alleged." *Associated General Contractors v. California State Council,* 459 U.S. 519, 526, 103 S.Ct. 897, 902, 74 L.Ed.2d 723 (1983)

Keeping in mind the deference which this Court is bound to give to the plaintiffs' allegations, each claim will be considered in the context of the relevant time period of the takings claims.

Period I (June 25, 1981 – August 28, 1983 – Ordinance 81-5)

The allegations of a regulatory taking arising from the period of June 25, 1981 through August 28, 1983 (Ordinance 81-5 period) will be discussed first. The defendants have raised a legitimate statute of limitations

defense. A 60-day statute of limitation in imposed by the Compact for any legal action arising out of any ordinance of the agency. Tahoe Regional Planning Compact (Public Law 96-551, 94 Stat. 3233; Cal.Gov.Code §§ 66800 & 66801; N.R.S. § 277.190 & § 277.200 Art. VI(j)(4)).[11] The TRPA took final action to enact the ordinance alleged to constitute a facial taking on June 25, 1981. The first complaint was not filed in this case until 1984.

Plaintiffs' efforts to save themselves from the requirement of filing prompt claims are not persuasive. Some takings do occur gradually and incrementally thereby extending the appropriate time period for filing an inverse condemnation suit until the consequences of the event are fully known. *See United States v. Dickinson,* 331 U.S. 745, 746-750, 67 S.Ct. 1382, 1383-1386, 91 L.Ed. 1789 (1947) (physical taking ultimately took place due to flooding caused by Federal Government damming a river – plaintiff permitted to file complaint when flooding damage could be determined); *Pierpont Inn, Inc. v. State,* 70 Cal.2d 282, 74 Cal.Rptr. 521, 449 P.2d 737 (1969) (plaintiff permitted to file complaint after property was appropriated for a freeway but prior to completion of construction project).

The case at hand arises from a claim against a regulatory taking. There has been no continuous physical invasion of the plaintiffs' land culminating in a taking. It was

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[11] The statute reads in pertinent part: "A legal action arising out of the adoption or amendment of the regional plan or of any ordinance or regulation of the agency, or out of the granting or denial of any permit, shall be commenced within 60 days after final action by the agency."

clear from the day Ordinance 81-5 was adopted that development was prohibited as to the SEZ plaintiffs. A facial takings claim based upon Ordinance 81-5 became actionable upon the date that TRPA took final action to enact the ordinance. There is no reason for the plaintiffs' delay in alleging a regulatory taking as a result of this Ordinance. Moreover, the defendants have not waived their right to raise this defense. There has been no adverse ruling by any of the Courts regarding the limitation of action issue as it pertains to Ordinance 81-5. In fact, during the litigation of this case, the Courts have consistently shown an overt unwillingness to reach decisions regarding the statute of limitations issues that had not been raised while alerting the parties and this Court that statute of limitations issues may be relevant. As there were no adverse ruling below, there was no basis for cross appeal and accordingly no waiver of the defense has occurred. "Even if an appellee does not file a cross appeal . . . he may defend the judgment in his favor with any argument that is supported by the record, regardless of whether it was ignored by the Court. (9 Moore's Federal Practice (2d ed. 1992) ¶ 204.11[3] at 4-47). TSPC's regulatory takings claims arising from Period I (Ordinance 81-5) are barred by the 60-day limitation of actions imposed by the Compact and are dismissed.

Period II (August 28, 1983-April 26, 1984 – Resolution 83-21)

As to the second relevant period, Resolution 83-21 was in effect from August 28, 1983 through April 26, 1984 (the eight-month moratorium). The 60-day statute of limitation applies to this period as well. A temporary resolution falls within the scope of the statute of limitations

provided in the Compact. The Compact expressly states that "any regulation" of the Agency is subject to a 60-day statute of limitations.[12] There is no logical argument as to why Board Resolution 83-21 would not fall within the scope of this statute. However, the Compact further expresses that any legal actions shall take place 60 days after "final action" by the agency. Resolution 83-21 was temporary in nature – admittedly an interim measure.[13] The notation that a "temporary resolution" amounts to "final action" deserves discussion.

There is little authority as to what constitutes "final action" on the part of TRPA. Previous discussions have centered around permit-specific disputes. *See Cal. Tahoe Regional Planning v. Sahara Tahoe Corp.*, 504 F.Supp. 751 (D.Nev.1980) (Court held that when TRPA treated a second application for permit for parking garage as request to reconsider Agency's previous denial of the request and then denied the request for a rehearing, the Agency took a "final action"); *Sederquist v. Tahoe Regional Planning Agency*, 652 F.Supp. 341 (D.Nev.1987). (Court held that TRPA's conditional approval of construction, rather than

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[12] See note 11 above.

[13] The TRPA governing Board temporarily suspended issuance of permits for projects because a serious legal question arose concerning TRPA's ability to continue project review and approval beyond August 26, 1983 without having an amended plan in effect. Article V(c) of the Compact required the amended plan to be adopted within one year after the environmental thresholds were established. The environmental thresholds had been established on August 26, 1982.

issuance of final permit, was "final action" within meaning of Compact providing for permit expiration three years after date of final action.)

Defendants assert that final action occurs at the time of adoption. Determination of when final action occurred as to the moratorium is crucial because if TRPA's construction is applied, then the plaintiffs are time-barred from any claim of a facial taking during this period. However, if it can be argued that a temporary resolution implementing a moratorium, does not constitute a final action, then the plaintiffs may be able to save this claim.

Interpretation given a statute by the agency charged with its administration is entitled to deference from the courts, *Thomas v. Peterson*, 753 F.2d 754, 762 (9th Cir.1985). It has already been established that the term "final action" is ambiguous. *See Sederquist*, 652 F.Supp. 341, 345). In the case at hand it could be interpreted to mean the Board's adoption of Resolution 83-21 or it could be interpreted to mean the final adoption of the amended plan following the Board's interim measure. If the court determines that legislation is ambiguous, the question is whether the agency's interpretation is a reasonable one, consistent with the statute's overall purpose. *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 2781-2782, 81 L.Ed.2d 694 (1984). If TRPA's interpretation is reasonable, then its interpretation controls. These legal principles are incorporated into the Compact. 1980 Compact, Article VI(j)(5).

Despite its temporary nature (8 months) the policy and effect of the Resolution was clear – no development permitted. The resolution was neither ambiguous nor its

application inconsistent. The day the Board adopted the Resolution it took final action as to what development could occur prior to the adoption of the 1987 Plan. Further, finding the adoption of a resolution as final action is consistent with *Sederquist, supra* where the conditional approval, although an interim measure, was found to constitute final action. Finally, the TRPA's interpretation of the adoption as "final action" is in accord with the implied purpose of Article VI(j) of the Compact to place a reasonable time-bar on actions. TRPA's interpretation of "final action" as to the adoption of Resolution 83-21 is reasonable. Consequently, TSPC's claims based upon Period II Resolution 83-21 are time-barred and dismissed.

Period III (April 26, 1984-June 25, 1987 – 1984 Plan and Court Injunction)

The third relevant time period when the (1984 Plan and the Court Ordered Injunction were in effect). The Court of Appeals held that claims arising from this period are ripe for review. However, the orders of the federal district court for the Eastern District of California enjoining TRPA from implementing the plan prevent TSPC from having a legitimate cause of action with relation to this period. This Court need not address the plaintiffs new assertion – that seeking an amendment to the plan would have been "futile" and therefore the ripeness defense is without merit – due to the injunction by the federal court.[14]

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[14] The State of California filed suit against TRPA on April 26, 1984 alleging that the 1984 Plan violated the Compact. Pursuant to this suit, the federal district court for the Eastern District of California ordered a preliminary injunction, preventing

The Court of Appeals specifically retained this issue for this Court. "We leave it to the district court to determine whether the intervening injunction prevented the 1984 Plan from causing any harm to the plaintiffs." *TSCP II* at 157. TSPC's taking challenge to the 1984 Regional Plan must fail because that plan was enjoined and never implemented, hence the requisite causation between the 1984 Plan and TSPC's purported injury is lacking as a matter of law. The injunction ordered by federal court prevented the 1984 Plan from ever taking effect. TRPA was enjoined from granting any development or building permit. Because the plan was never put into effect it could not have caused a taking. The claim fails for lack of causation. *See Carpenter v. Tahoe Regional Planning Agency,* 804 F.Supp. 1316 (D.Nev. 1992). TSPC's claims for relief arising from Period III are dismissed.

Period IV (June 25, 1987-present – 1987 Plan)

The 1987 Plan encompasses the last relevant time period to be addressed. Claims arising under this plan are also dismissed. The conclusory allegation that the 1987 Plan is merely a continuation of the 1984 Plan and other regulations that allegedly amount to a taking is not persuasive to this Court even in the deferential light the Court must use in evaluating the plaintiffs claims. This action was originally filed in 1984 long before the 1987 Plan was in effect.

Raising allegations against TRPA on the basis of the 1987 Plan runs afoul of the statute of limitations. "An

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TRPA from authorizing any development. The injunction was extended through July 5, 1987.

amendment of a pleading relates back to the date of the original pleading when . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading . . . " Fed.R.Civ.P. Rule 15(c)(2). When a plaintiff attempts to allege an entirely different transaction by amendment, Rule 15(c) will not authorize relation back 6A. Wright, Miller & Kane, *Federal Practice and Procedure* § 1497 (2d ed. 1990). The TRPA's regulatory scheme embodied by the 1987 Plan is "markedly different from the 1984 Plan it replaced." *TSPC I* at 1334. As a result, the enlarged lawsuit now brought by TSPC rests on a different factual basis than those claims which survived from the original complaints. Amendments to complaints alleging claims arising from different contracts, different patents and separate violations do not "relate" back to the original complaint. Amendments that merely correct technical deficiencies or expand or modify the facts alleged in the earlier pleading meet the Rule 15(c) test and will relate back.

Because the rationale of the relation back rule is to ameliorate the effect of the statute of limitations[15] rather than to promote the joinder of claims and parties, the standard for determining whether amendments qualify under Rule 15(c) is not simply an identity of transaction test; although not expressly mentioned in the rule, the courts also inquire into whether the opposing party has

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[15] The Court notes that the time period for filing such an action is now barred by the 60 day statute of limitation for actions against the 1987 Plan.

been put on notice regarding the claim raised by the amended pleading. *Id.* In this case the allegations of taking pursuant to the 1987 Plan do not rest on the same general conduct, transaction or occurrence as the earlier claims. Nor does the fact that plaintiffs were pursuing taking claims in 1984 put the plaintiffs on notice that six years later (and approximately four years after the adoption of the plan at issue) an entirely different plan would be attacked as constituting a facial taking.

While Rule 15(a) does place an additional burden on the defendants in this case to have filed a separate complaint against the TRPA with regard to its 1987 plan, the alternative is to place an additional burden on the plaintiff – the burden of defending a new claim after 6 years of litigation centered around distinctly different claims and facts. The plaintiffs' arguments of inconvenience are well taken; however, they do not weigh heavier than the rational behind Rule 15. Nor does justice require that this Court give leave to the amendment with regard to the new claims arising from the 1987 Plan. The plaintiffs' concern that the defendants would have "squealed like stuck pigs" had they (the plaintiffs) sought to file amended complaints while the matter was on appeal presents a colorful image but an unconvincing argument. Requiring the plaintiff to file a separate complaint against the TRPA for the 1987 does not amount to piecemeal litigation. The 1987 Plan is completely different. It is not merely an amended 1984 Plan without substantive changes (compare with *Tollis v. San Bernardino County*, 827 F.2d 1329 (9th Cir. 1987)) nor is a continuing process of physical intrusion (compare with *United States v. Dickinson, supra*) nor does the 1987 Plan merely add a variance

provision to the original statute (compare with *Lucas v. South Carolina Coastal Council, supra*).

The Ninth Circuit by mentioning the 1987 plan in its mootness analysis of certain claims did not open the door for claims arising from the Plan to be included in the Amended Complaints. If anything, the Court's affirmation of the dismissal of claims for declaratory and injunctive relief from the 1984 Plan because they were mooted by the 1987 plan, demonstrates the Court's recognition that an entirely new statutory scheme was in place. A claim based upon an entirely different regulatory plan cannot be added to an existing complaint. The 1987 Plan was developed from discussions lasting over two years in a "consensus building workshop" initiated by TRPA and designed to include the broadest possible range of private and governmental interests and viewpoints. Moreover, the 1987 plan could not be considered a continuation of the 1984 plan because the 1984 plan never went into effect as a result of the District Court of California's order enjoining the TRPA from implementing the plan.

While the Court dismisses the claims arising from the 1987 Plan on the basis of Rule 15 and the time-bar, it is also noted that claims in respect to the 1987 Plan would not be ripe until the plaintiffs avail themselves of the mechanisms in the 1987 Plan (e.g. challenging the IPES Scores and exploration of development transfer). Plaintiffs must avail themselves of the options available as a prerequisite to any claim against TRPA. Although the Court of Appeals in *TSPC II* did find that it is not necessary to seek amendment to a plan in order to make a claim against such plan ripe, it did not hold that plaintiffs can merely ignore all mechanisms available. TSPC's

claims based upon the 1987 Plan are dismissed because they are not properly joined, do not relate back to the 1984 Plan and are now time-barred by the 60-day statute of limitations and are not ripe even if they had been validly asserted.

CONCLUSION

The Court of Appeals in *TSPC I* and *TSPC II* found that a temporary takings claim can exist and should compensated even after the period of the taking has passed. The Circuit Court relied on *First English* for this finding and now *Lucas* adds support to such a claim. However, the Circuit Court did not render any decisions as to potential statute of limitations defenses, the effect of the court injunction during the 1984 Plan, or the ripeness or appropriateness of any [sic] the claims arising from the 1987 Plan. Plaintiffs attempted to simplify this very complex matter by focusing their arguments on liberal readings of the two new Supreme Court cases and a broad reading of the Court of Appeals' limited rulings. Nevertheless, plaintiffs' claims cannot survive a Motion to Dismiss.

As to plaintiffs' First Claim for Relief (SEZ plaintiffs), the claim arising from Period I is time-barred and dismissed. The claim arising from Period II is time-barred and dismissed. The claim arising from Period III lacks the requisite causation and is dismissed. The claim arising from Period IV was made in violation of Fed.R.Civ.P. Rule 15, is time-barred, is not ripe, and is dismissed.

As to plaintiffs' Second Claim for Relief (Class 1, 2, and 3 plaintiffs), the claim arising from Period I is time-

barred and dismissed. The claim arising from Period II is time-barred and dismissed. The claim arising from Period III lacks the requisite causation and is dismissed. The claim arising from Period IV was made in violation of Fed.R.Civ.P. Rule 15, is time-barred, is not ripe and is dismissed.

As to plaintiffs' Third Claim for Relief (SEZ and Class 1, 2, and 3 plaintiffs), the claim was limited to the extent it was based on the claims of denial of Just Compensation. No basis for the claim exists in light of the dismissal of both claims One and Two as to Periods I, II, III and IV. Claim Three is dismissed.

IT IS, THEREFORE, HEREBY ORDERED that defendants' Motion to Dismiss Plaintiffs' First Amendment Complaint (document #135a) is GRANTED. The Clerk shall enter judgement accordingly.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE TAHOE SIERRA PRESERVATION COUNCIL, INC., et al., Plaintiff-Appellant, v. THE TAHOE REGIONAL PLANNING AGENCY, et al., Defendant-Appellee.	No. 93-15113 D.C. No. CV-84-00257-ECR
THE TAHOE SIERRA PRESERVATION COUNCIL, INC., et al., Plaintiff-Appellant, v. THE TAHOE REGIONAL PLANNING AGENCY, et al., Defendant-Appellee.	No. 93-15114 D.C. No. CV-84-00257-ECR **ORDER** (Filed Nov. 2, 1994)

Before: NOONAN, and T.G. NELSON, Circuit Judges, EZRA,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Noonan and Nelson have voted to reject the suggestion for rehearing en banc, and Judge Ezra so recommends.

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*The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 93-15113
CT/AG#: CV-90-00098-ECR
CT/AG#: CV-84-00257-ECR

THE TAHOE SIERRA PRESERVATION COUNCIL, INC., et al,.

Plaintiff-Appellant

v.

THE TAHOE REGIONAL PLANNING AGENCY, et al,.

Defendant-Appellee

NO. 93-15114
CT/AG#: CV-92-00098-ECR
CT/AG#: CV-84-00257-ECR

THE TAHOE SIERRA PRESERVATION COUNCIL, INC., et al,.

Plaintiff-Appellant

v.

THE TAHOE REGIONAL PLANNING AGENCY, et al,.

Defendant-Appellee

(Filed Nov. 15, 1994)

APPEAL FROM the United States District Court for the District of Nevada (Reno).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada (Reno) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Filed and entered August 10, 1994.

ADDITIONAL PARTIES TO THE PROCEEDINGS (SUPREME COURT RULE 14.1(b))

BRUCE A. AMES and JUDITH M. AMES; LAURA L. ANDERSON and JAMES E. ANDERSON; ALFRED J. ANTONINI; CAROLYN J. APPLEBY; EDWARD ARRI and BARBARA ARRI; GEORGE P. ASCHE and PRISCILLA J. ASCHE; LEONARD W. ASCHER and ADELINE H. ASCHER; ALPINE INVESTMENT; NICK BADAMI; WES BALLARD; M.A. BEHR and ESTHER M. BEHR, CLARENCE C. BENEDICT; MAX V. BENTLEY and MINNIE R. BENTLEY; LEROY G. BLACK; RICHARD A. BLASCO and AIDA M. BLASCO; ARLETTE I. BROWN; ARTHUR C. BYSTROM; ALLAN F. CASE and TERUKO CASE; DON N. CHOATE and LORRAINE E. CHOATE; EDWARD W. CISLO, JR. and LA VERNE C. CISLO; JAMES D. CLEMENT; ROBERT D. COLCLAZIER; JAMES R. COMPTON; CARL D. COOK; DOROTHY MAE COOK; HAROLD F. CORNELIUS; JOAN COSTA; DONALD COTTEN; OLGA R. CROSETTI; ALAN W. DAGG; GWENDOLYN IONE DAY; EDDY K. DAYNE and ANNE M. DAYNE; RICHARD DEFENBAUGH and TERESA DEFENBAUGH; JOHN J. DESTEFANO; JESS R. DETEVIS and DIANE DETEVIS; ROBERT E. DIXON and JUDITH E. DIXON; STEVEN N. DOLIN and MARY T. DOLIN; MARILYN T. DURBIN; KENNETH W. EBERLE and BETTY L. EBERLE; WILLIAM A. EDWARDS, JR. and FRANCES M. EDWARDS; ANDRE YANN EGASSE; RONALD F. ELIOFF and DENNE M. ELIOFF; J. ROY ELMS and ELIZABETH D. ELMS; NEALE M. ENSIGN and CHRISTINA H. ENSIGN; SONIA D. ERICKSON PETER L. FAVRO; BEN H. FERGUSON; DEREK FERRIERA and DELORES FERRIERA; MOREY B. FLEMING and DOROTHY R. FLEMING; WILLIAM J. FOLEY and SHIRLEY J. FOLEY; DOUGLAS H. FORD; FRANK A. FOTI and ROSE A. FOTI; JUDITH ANN FRIEDMAN; W.C. FROELICH, INC.; CLIFFORD A. FROST and

LORRAINE L. FROST; MOSES D. GARAY and ROSE GARAY; FRANK M. GARCIA; LAURA E. GARCIA; F.W. GASSER and ROSE GASSER; LOUIS GEORGE and ELIZABETH GEORGE; ANNA F. GERACI and SALVATORE GERACI; ERNEST O. GERMANN and VIRGINE M. GERMANN; CHRISTOPHER P. GERSHEL and SHARON A. GERSHEL; WILLIAM L. GILL; KURT A. GRAF and NELLIE O. GRAF; ROBERT U. GRANT CIVIL ENGINEERING CO., INC.; ROGER DALE GRESHAM; RICHARD H. GUZMAN and CLAUDIA D. GUZMAN; G.E.M. DEVELOPMENT, INCORPORATED; DAN HAMMON and SHERRIE HAMMON; CHARLES S. HANSON, JR. and VIRGINIA R. HANSON; WILSON L. HARRELL; DAN M. HAUSERMAN; HELEN L. HEDRICK; WAYNE F. HESS and LORRAINE E. HESS; DOUGLAS J. HINDS and MARIAN O. HINDS; J.C. HINTON and LA VAUN E. HINTON; DONALD I. HITT; LOREN HOLMWOOD; DONNA IVY; CARLTON S. JAMES; JOHN JAVORSKY and HELEN JAVORSKY; K.D. JEFFERSON and WINNIFRED A. JEFFERSON; EDWARD N. JELLINS and JANET L. JELLINS; RUDOLPH JOHNSON and PATRICIA JOHNSON; ARNE JORGENSEN; VINCENT S. KEELE and TEDDYANNA P. KEELE; ROY KERTON and LADONNA KERTON; MIKLOS J. KISIDAY and VALIRIA E. KISIDAY; VIRGINIA J. KOTECKI; PETER LANGE; OLAF O. LARSON; CHARLES W. LEW; ROBERT E. LIVESAY and FRANCES M. LIVESAY; HENRY G. LOUIE and LOUISE LOUIE; IAN D. MACGREGOR; MELVIN J. MADDEN and RUTH L. MADDEN; MARIO A. MANDOLI and ALICE M. MANDOLI; ANTHONY JOHN MARAN; DAN H. MARSHALL; LEONARD MAYRISCH, JR.; EDWARD J. MCCARTHY; HALL B. MC ELREE and GEORGETTA B. MC ELREE; FRANK J. MERRITT and SHARON M. MERRITT; HOWARD A. MILLER and ANTOINETTA R. MILLER; ANKICA MILOSAVLJEVIC; CHARLES S. MITCHELL; CARL V. MODUGNO; ERNESTINE H.

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PUBLIC LAW 96-551, 94 Stat. 3233 (DEC. 19, 1980)

An Act

To grant the consent of the Congress to the Tahoe Regional Planning Compact, and to authorize the Secretary of Agriculture and others to cooperate with the planning agency thereby created.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to encourage the wise use and conservation of the waters of Lake Tahoe and of the resources of the area around said lake, the consent of the Congress is hereby given to the Tahoe Regional Planning Compact heretofore adopted by the States of California and Nevada, which compact reads as follows:

TAHOE REGIONAL PLANNING COMPACT

ARTICLE I. FINDINGS AND DECLARATIONS OF POLICY

(a) It is found and declared that:

(1) The waters of Lake Tahoe and other resources of the region are threatened with deterioration or degeneration, which endangers the natural beauty and economic productivity of the region.

(2) The public and private interests and investments in the region are substantial.

(3) The region exhibits unique environmental and ecological values which are irreplaceable.

(4) By virtue of the special conditions and circumstances of the region's natural ecology, developmental pattern, population distribution and human needs, the region is experiencing problems of resource use and deficiencies of environmental control.

(5) Increasing urbanization is threatening the ecological values of the region and threatening the public opportunities for use of the public lands.

(6) Maintenance of the social and economic health of the region depends on maintaining the significant scenic, recreational, educational, scientific, natural and public health values provided by the Lake Tahoe Basin.

(7) There is a public interest in protecting, preserving and enhancing these values for the residents of the region and for visitors to the region.

(8) Responsibilities for providing recreational and scientific opportunities, preserving scenic and natural areas, and safeguarding the public who live, work and play in or visit the region are divided among local governments, regional agencies, the States of California and Nevada, and the federal government.

(9) In recognition of the public investment and multistate and national significance of the recreational values, the federal government has an interest in the acquisition of recreational property and the management of resources in the region to preserve environmental and recreational values, and the federal government should assist the states in fulfilling their responsibilities.

(10) In order to preserve the scenic beauty and outdoor recreational opportunities of the region, there is a need to insure an equilibrium between the region's natural endowment and its manmade environment.

(b) In order to enhance the efficiency and governmental effectiveness of the region, it is imperative that there be established a Tahoe Regional Planning Agency with the powers conferred by this compact including the power to establish environmental threshold carrying capacities and to adopt and enforce a regional plan and implementing ordinances which will achieve and maintain such capacities while providing opportunities for orderly growth and development consistent with such capacities.

(c) The Tahoe Regional Planning Agency shall interpret and administer its plans, ordinances, rules and regulations in accordance with the provisions of this compact.

ARTICLE II. DEFINITIONS

As used in this compact, the following terms have the following meanings:

(a) "Region," includes Lake Tahoe, the adjacent parts of Douglas and Washoe Counties and Carson City, which for the purposes of this compact shall be deemed a county, lying within the Tahoe Basin in the State of Nevada, and the adjacent parts of the Counties of Placer and El Dorado lying within the Tahoe Basin in the State of California, and that additional and adjacent part of the County of Placer outside of the Tahoe Basin in the State of California which lies southward and eastward of a line

starting at the intersection of the basin crestline and the north boundary of Section 1, thence west to the northwest corner of Section 3, thence south to the intersection of the basin crestline and the west boundary of Section 10; all sections referring to Township 15 North, Range 16 East, M.D.B. & M. The region defined and described herein shall be as precisely delineated on official maps of the agency.

(b) "Agency" means the Tahoe Regional Planning Agency.

(c) "Governing body" means the governing board of the Tahoe Regional Planning Agency.

(d) "Regional plan" means the long-term general plan for the development of the region.

(e) "Planning commission" means the advisory planning commission appointed pursuant to subdivision (h) of Article III.

(f) "Gaming" means to deal, operate, carry on, conduct, maintain or expose for play any banking or percentage game played with cards, dice or any mechanical device or machine for money, property, checks, credit or any representative of value, including, without limiting the generality of the foregoing, faro, monte, roulette, keno, bingo, fan-tan, twenty-one, blackjack, seven-and-a-half, big injun, klondike, craps, stud poker, draw poker or slot machine, but does not include social games played solely for drinks, or cigars or cigarettes served individually, games played in private homes or residences for prizes or games operated by charitable or educational

organizations, to the extent excluded by applicable state law.

(g) "Restricted gaming license" means a license to operate not more than 15 slot machines on which a quarterly fee is charged pursuant to NRS 463.373 and no other games.

(h) "Project" means an activity undertaken by any person, including any public agency, if the activity may substantially affect the land, water, air, space or any other natural resources of the region.

(i) "Environmental threshold carrying capacity" means an environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety within the region. Such standards shall include but not be limited to standards for air quality, water quality, soil conservation, vegetation preservation and noise.

(j) "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors.

(k) "Areas open to public use" means all of the areas within a structure housing gaming under a nonrestricted license except areas devoted to the private use of guests.

(l) "Areas devoted to private use of guests" means hotel rooms and hallways to serve hotel room areas, and any parking areas. A hallway serves hotel room areas if more than 50 percent of the areas of each side of the hallway are hotel rooms.

(m) "Nonrestricted license" means a gaming license which is not a restricted gaming license.

ARTICLE III. ORGANIZATION

(a) There is created the Tahoe Regional Planning Agency as a separate legal entity.

The governing body of the agency shall be constituted as follows:

(1) California delegation:

(A) One member appointed by each of the County Boards of Supervisors of the Counties of El Dorado and Placer and one member appointed by the City Council of the City of South Lake Tahoe. Any such member may be a member of the county board of supervisors or city council, respectively, and shall reside in the territorial jurisdiction of the governmental body making the appointment.

(B) Two members appointed by the Governor of California, one member appointed by the Speaker of the Assembly of California and one member appointed by the Senate Rules Committee of the State of California. The members appointed pursuant to this subparagraph shall not be residents of the region and shall represent the public at large within the State of California. A member appointed by the Speaker of the Assembly or the Senate Rules Committee may, subject to confirmation by his or her appointing power, designate an alternate to attend meetings and vote in the absence of the appointed member. The designation of a named alternate, which shall

be in writing and contain evidence of confirmation by the appointing power, shall be kept on file with the agency. An appointed member may change his or her alternate from time to time, with the confirmation of the appointing power, but shall have only one designated alternate at a time. An alternate shall be subject to those qualifications and requirements prescribed by this compact that are applicable to the appointed member.

(2) Nevada delegation:

(A) One member appointed by each of the boards of county commissioners of Douglas and Washoe Counties and one member appointed by the Board of Supervisors of Carson City. Any such member may be a member of the board of county commissioners or board of supervisors, respectively, and shall reside in the territorial jurisdiction of the governmental body making the appointment.

(B) Two members appointed by the Governor of Nevada, one member appointed by the Speaker of the Assembly and one member appointed by the Majority Leader of the Nevada Senate. All members appointed pursuant to this subparagraph shall not be residents of the region and shall represent the public at large within the State of Nevada. A member appointed by the Speaker of the Nevada Assembly or the Majority Leader of the Nevada Senate may, subject to confirmation by his or her appointing power, designate an alternate to attend meetings and vote in the absence of the appointed member. The designation of a named alternate, which shall be in writing and contain evidence of confirmation by the

appointing power, shall be kept on file with the agency. An appointed member may change his or her alternate from time to time, with the confirmation of the appointing power, but shall have only one designated alternate at a time. An alternate shall be subject to those qualifications and requirements prescribed by this compact that are applicable to the appointed member.

(3) If any appointing authority under paragraph (1)(A), (1)(B), (2)(A) or (2)(B) fails to make such an appointment within 60 days after the effective date of the amendments to this compact or the occurrence of a vacancy on the governing body, the governor of the state in which the appointing authority is located shall make the appointment. The term of any member so appointed shall be 1 year.

(4) The position of any member of the governing body shall be deemed vacant if such a member is absent from three consecutive meetings of the governing body in any calendar year.

(5) Each member and employee of the agency shall disclose his economic interests in the region within 10 days after taking his seat on the governing board or being employed by the agency and shall thereafter disclose any further economic interest which he acquires, as soon as feasible after he acquires it. As used in this paragraph, "economic interests" means:

(A) Any business entity operating in the region in which the member or employee has a direct or indirect investment worth more than one thousand dollars ($1,000).

(B) Any real property located in the region in which the member or employee

has a direct or indirect interest worth more than one thousand dollars ($1,000).

(C) Any source of income attributable to activities in the region, other than loans by or deposits with a commercial lending institution in the regular course of business, aggregating two hundred fifty dollars ($250) or more in value received by or promised to the member within the preceding 12 months; or

(D) Any business entity operating in the region in which the member or employee is a director, officer, partner, trustee, employee or holds any position of management.

No member or employee of the agency shall make, or attempt to influence, an agency decision in which he knows or has reason to know he has an economic interest. Members and employees of the agency must disqualify themselves from making or participating in the making of any decision of the agency when it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the economic interests of the member or employee.

(b) The members of the agency shall serve without compensation, but the expenses of each member shall be met by the body which he represents in accordance with the law of that body. All other expenses incurred by the governing body in the course of exercising the powers conferred upon it by this compact unless met in some other manner specifically provided, shall be paid by the agency out of its own funds.

(c) The members of the governing body serve at the pleasure of the appointing authority in each case, but

each appointment shall be reviewed no less often than every 4 years. Members may be reappointed.

(d) The governing body of the agency shall meet at least monthly. All meetings shall be opened to the public to the extent required by the law of the State of California or the State of Nevada, whichever imposes the greater requirement, applicable to local governments at the time such meeting is held. The governing body shall fix a date for its regular monthly meeting in such terms as "the first Monday of each month," and shall not change such date more often than once in any calendar year. Notice of the date so fixed shall be given by publication at least once in a newspaper or combination of newspapers whose circulation is general throughout the region and in each county a portion of whose territory lies within the region. Notice of any special meeting, except an emergency meeting, shall be given by so publishing the date and place and posting an agenda at least 5 days prior to the meeting.

(e) The position of a member of the governing body shall be considered vacated upon his loss of any of the qualifications required for his appointment and in such event the appointing authority shall appoint a successor.

(f) The governing body shall elect from its own members a chairman and vice chairman, whose terms of office shall be 2 years, and who may be reelected. If a vacancy occurs in either office, the governing body may fill such vacancy for the unexpired term.

(g) Four of the members of the governing body from each state constitute a quorum for the transaction of the

business of the agency. The voting procedures shall be as follows:

(1) For adopting, amending or repealing environmental threshold carrying capacities, the regional plan, and ordinances, rules and regulations, and for granting variances from the ordinances, rules and regulations, the vote of at least four of the members of each state agreeing with the vote of at least four members of the other state shall be required to take action. If there is no vote of at least four of the members from one state agreeing with the vote of at least four of the members of the other state on the actions specified in this paragraph, an action of rejection shall be deemed to have been taken.

(2) For approving a project, the affirmative vote of at least five members from the state in which the project is located and the affirmative vote of at least nine members of the governing body are required. If at least five members of the governing body from the state in which the project is located and at least nine members of the entire governing body do not vote in favor of the project, upon a motion for approval, an action of rejection shall be deemed to have been taken. A decision by the agency to approve a project shall be supported by a statement of findings, adopted by the agency, which indicates that the project complies with the regional plan and with applicable ordinances, rules and regulations of the agency.

(3) For routine business and for directing the agency's staff on litigation and enforcement actions, at least eight members of the governing body must agree to take action. If at least eight votes in favor of such action are not cast, an action of rejection shall be deemed to have been taken.

Whenever under the provisions of this compact or any ordinance, rule, regulation or policy adopted pursuant thereto, the agency is required to review or approve any project, public or private, the agency shall take final action by vote, whether to approve, to require modification or to reject such project, within 180 days after the application for such project is accepted as complete by the agency in compliance with the agency's rules and regulations governing such delivery unless the applicant has agreed to an extension of this time limit. If a final action by vote does not take place within 180 days, the applicant may bring an action in a court of competent jurisdiction to compel a vote unless he has agreed to an extension. This provision does not limit the right of any person to obtain judicial review of agency action under subdivision (h) of Article VI. The vote of each member of the governing body shall be individually recorded. The governing body shall adopt its own rules, regulations and procedures.

(h) An advisory planning commission shall be appointed by the agency. The commission shall include: the chief planning officers of Placer County, El Dorado County, and the City of South Lake Tahoe in California and of Douglas County, Washoe County and Carson City in Nevada, the executive officer of the Lahontan Regional Water Quality Control Board of the State of California, the executive officer of the Air Resources Board of the State of California, the Director of the State Department of Conservation and Natural Resources of the State of Nevada, the Administrator of the Division of Environmental Protection in the State Department of Conservation and Natural Resources of the State of Nevada, the

Administrator of the Lake Tahoe Management Unit of the United States Forest Service, and at least four lay members with an equal number from each state, at least half of whom shall be residents of the region. Any official member may designate an alternate.

The term of office of each lay member of the advisory planning commission shall be 2 years. Members may be reappointed.

The position of each member of the advisory planning commission shall be considered vacated upon loss of any of the qualifications required or appointment, and in such an event the appointing authority shall appoint a successor.

The advisory planning commission shall elect from its own members a chairman and a vice chairman, whose terms of office shall be 2 years and who may be reelected. If a vacancy occurs in either office, the advisory planning commission shall fill such vacancy for the unexpired term.

A majority of the members of the advisory planning commission constitutes a quorum for the transaction of the business of the commission. A majority vote of the quorum present shall be required to take action with respect to any matter.

(i) The agency shall establish and maintain an office within the region, and for this purpose the agency may rent or own property and equipment. Every plan, ordinance and other record of the agency which is of such nature as to constitute a public record under the law of either the State of California or the State of Nevada shall

be opened to inspection and copying during regular office hours.

(j) Each authority charged under this compact or by the law of either state with the duty of appointing a member of the governing body of the agency shall by certified copy of its resolution or other action notify the Secretary of State of its own state of the action taken.

ARTICLE IV. PERSONNEL

(a) The governing body shall determine the qualification of, and it shall appoint and fix the salary of, the executive officer of the agency, and shall employ such other staff and legal counsel as may be necessary to execute the powers and functions provided for under this compact or in accordance with any intergovernmental contracts or agreements the agency may be responsible for administering.

(b) Agency personnel standards and regulations shall conform insofar as possible to the regulations and procedures of the civil service of the State of California or the State of Nevada, as may be determined by the governing body of the agency; and shall be regional and bistate in application and effect; provided that the governing body may, for administrative convenience and at its discretion, assign the administration of designated personnel arrangements to an agency of either state, and provided that administratively convenient adjustments be made in the standards and regulations governing personnel assigned under intergovernmental agreements.

(c) The agency may establish and maintain or participate in such additional programs of employee benefits as may be appropriate to afford employees of the agency terms and conditions of employment similar to those enjoyed by employees of California and Nevada generally.

ARTICLE V. PLANNING

(a) In preparing each of the plans required by this article and each amendment thereto, if any, subsequent to its adoption, the planning commission after due notice shall hold at least one public hearing which may be continued from time to time, and shall review the testimony and any written recommendations presented at such hearing before recommending the plan or amendment. The notice required by this subdivision shall be given at least 20 days prior to the public hearing by publication at least once in a newspaper or combination of newspapers whose circulation is general throughout the region and in each county a portion of whose territory lies within the region.

The planning commission shall then recommend such plan or amendment to the governing body for adoption by ordinance. The governing body may adopt, modify or reject the proposed plan or amendment, or may initiate and adopt a plan or amendment without referring it to the planning commission. If the governing body initiates or substantially modifies a plan or amendment, it shall hold at least one public hearing thereon after due notice as required in this subdivision.

If a request is made for the amendment of the regional plan by:

(1) A political subdivision a part of whose territory would be affected by such amendment; or

(2) The owner or lessee of real property which would be affected by such amendment,

the governing body shall complete its action on such amendment within 180 days after such request is accepted as complete according to standards which must be prescribed by ordinance of the agency.

(b) The agency shall develop, in cooperation with the States of California and Nevada, environmental threshold carrying capacities for the region. The agency should request the President's Council on Environmental Quality, the U.S. Forest Service and other appropriate agencies to assist in developing such environmental threshold carrying capacities. Within 18 months after the effective date of the amendments to this compact, the agency shall adopt environmental threshold carrying capacities for the region.

(c) Within 1 year after the adoption of the environmental threshold carrying capacities for the region, the agency shall amend the regional plan so that, at a minimum, the plan and all of its elements, as implemented through agency ordinances, rules and regulations, achieves and maintains the adopted environmental threshold carrying capacities. Each element of the plan shall contain implementation provisions and time schedules for such implementation by ordinance. The planning commission and governing body shall continuously

review and maintain the regional plan. The regional plan shall consist of a diagram, or diagrams, and text, or texts setting forth the projects and proposals for implementation of the regional plan, a description of the needs and goals of the region and a statement of the policies, standards and elements of the regional plan.

The regional plan shall be a single enforceable plan and include all of the following correlated elements:

(1) A land use plan for the integrated arrangement and general location and extent of, and the criteria and standards for, the uses of land, water, air, space and other natural resources within the region, including but not limited to, an indication or allocation of maximum population densities and permitted uses.

(2) A transportation plan for the integrated development of a regional system of transportation, including but not limited to parkways, highways, transportation facilities, transit routes, waterways, navigation facilities, public transportation facilities, bicycle facilities, and appurtenant terminals and facilities for the movement of people and goods within the region. The goal of transportation planning shall be:

(A) To reduce dependency on the automobile by making more effective use of existing transportation modes and of public transit to move people and goods within the region and

(B) To reduce to the extent feasible air pollution which is caused by motor vehicles.

Where increases in capacity are required, the agency shall give preference to providing such

capacity through public transportation and public programs and projects related to transportation. The agency shall review and consider all existing transportation plans in preparing its regional transportation plan pursuant to this paragraph.

The plan shall provide for an appropriate transit system for the region.

The plan shall give consideration to:

(A) Completion of the Loop Road in the States of Nevada and California;

(B) Utilization of a light rail mass transit system in the South Shore area; and

(C) Utilization of a transit terminal in the Kingsbury Grade area.

Until the regional plan is revised, or a new transportation plan is adopted in accordance with this paragraph, the agency has no effective transportation plan.

(3) A conservation plan for the preservation, development, utilization, and management of the scenic and other natural resources within the basin, including but not limited to, soils, shoreline and submerged lands, scenic corridors along transportation routes, open spaces, recreational and historical facilities.

(4) A recreation plan for the development, utilization, and management of the recreational resources of the region, including but not limited to, wilderness and forested lands, parks and parkways, riding and hiking trails, beaches and playgrounds, marinas, areas for skiing and other recreational facilities.

(5) A public services and facilities plan for the general location, scale and provision of public services and facilities, which, by the nature of

their function, size, extent and other characteristics are necessary or appropriate for inclusion in the regional plan.

In formulating and maintaining the regional plan, the planning commission and governing body shall take account of and shall seek to harmonize the needs of the region as a whole, the plans of the counties and cities within the region, the plans and planning activities of the state, federal and other public agencies and nongovernmental agencies and organizations which affect or are concerned with planning and development within the region.

(d) The regional plan shall provide for attaining and maintaining federal, state, or local air and water quality standards, whichever are strictest, in the respective portions of the region for which the standards are applicable.

The agency may, however, adopt air or water quality standards or control measures more stringent than the applicable state implementation plan or the applicable federal, state, or local standards for the region, if it finds that such additional standards or control measures are necessary to achieve the purposes of this compact. Each element of the regional plan, where applicable, shall, by ordinance, identify the means and time schedule by which air and water quality standards will be attained.

(e) Except for the Regional Transportation Plan of the California Tahoe Regional Planning Agency, the regional plan, ordinances, rules and regulations adopted by the California Tahoe Regional Planning Agency in effect on July 1, 1980, shall be the regional plan, ordinances, rules and regulations of the Tahoe Regional Planning Agency

for that portion of the Tahoe region located in the State of California. Such plan, ordinance, rule or regulation may be amended or repealed by the governing body of the agency. The plans, ordinances, rules and regulations of the Tahoe Regional Planning Agency that do not conflict with, or are not addressed by, the California Tahoe Regional Planning Agency's plans, ordinances, rules and regulations referred to in this subdivision shall continue to be applicable unless amended or repealed by the governing body of the agency. No provision of the regional plan, ordinances, rules and regulations of the California Tahoe Regional Planning Agency referred to in this subdivision shall apply to that portion of the region within the State of Nevada, unless such provision is adopted for the Nevada portion of the region by the governing body of the agency.

(f) The regional plan, ordinances, rules and regulations of the Tahoe Regional Planning Agency apply to that portion of the region within the State of Nevada.

(g) The agency shall adopt ordinances prescribing specific written findings that the agency must make prior to approving any project in the region. These findings shall relate to environmental protection and shall insure that the project under review will not adversely affect implementation of the regional plan and will not cause the adopted environmental threshold carrying capacities of the region to be exceeded.

(h) The agency shall maintain the data, maps and other information developed in the course of formulating and administering the regional plan, in a form suitable to assure a consistent view of developmental trends and

other relevant information for the availability of and use by other agencies of government and by private organizations and individuals concerned.

(i) Where necessary for the realization of the regional plan, the agency may engage in collaborative planning with local governmental jurisdictions located outside the region, but contiguous to its boundaries. In formulating and implementing the regional plan, the agency shall seek the cooperation and consider the recommendations of counties and cities and other agencies of local government, of state and federal agencies, of educational institutions and research organizations, whether public or private, and of civic groups and private persons.

ARTICLE VI. AGENCY'S POWERS

(a) The governing body shall adopt all necessary ordinances, rules, and regulations to effectuate the adopted regional plan. Except as otherwise provided in this compact, every such ordinance, rule or regulation shall establish a minimum standard applicable throughout the region. Any political subdivision or public agency may adopt and enforce an equal or higher requirement applicable to the same subject of regulation in its territory. The regulations of the agency shall contain standards including but not limited to the following: water purity and clarity; subdivision; zoning; tree removal; solid waste disposal; sewage disposal; land fills, excavations, cuts and grading; piers, harbors, breakwaters or channels and other shoreline developments; waste disposal in shoreline areas; waste disposal from boats;

mobile-home parks; house relocation; outdoor advertising; flood plain protection; soil and sedimentation control; air pollution; and watershed protection. Whenever possible without diminishing the effectiveness of the regional plan, the ordinances, rules, regulations and policies shall be confined to matters which are general and regional in application, leaving to the jurisdiction of the respective states, counties and cities the enactment of specific and local ordinances, rules, regulations and policies which conform to the regional plan.

The agency shall prescribe by ordinance those activities which it has determined will not have substantial effect on the land, water, air, space or any other natural resources in the region and therefore will be exempt from its review and approval.

Every ordinance adopted by the agency shall be published at least once by title in a newspaper or combination of newspapers whose circulation is general throughout the region. Except an ordinance adopting or amending the regional plan, no ordinance shall become effective until 60 days after its adoption. Immediately after its adoption, a copy of each ordinance shall be transmitted to the governing body of each political subdivision having territory within the region.

(b) No project other than those to be reviewed and approved under the special provisions of subdivisions (d), (e), (f) and (g) may be developed in the region without obtaining the review and approval of the agency and no project may be approved unless it is found to comply with the regional plan and with the ordinances, rules and

regulations enacted pursuant to subdivision (a) to effectuate that plan. The agency may approve a project in the region only after making the written findings required by this subdivision or subdivision (g) of Article V. Such findings shall be based on substantial evidence in the record.

Before adoption by the agency of the ordinances required in subdivision (g) of Article V, the agency may approve a project in the region only after making written findings on the basis of substantial evidence in the record that the project is consistent with the regional plan then in effect and with applicable plans, ordinances, regulations and standards of federal and state agencies relating to the protection, maintenance and enhancement of environmental quality in the region.

(c) The Legislatures of the States of California and Nevada find that in order to make effective the regional plan as revised by the agency, it is necessary to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan. Subject to the limitation provided in this subdivision, from the effective date of the amendments to this compact until the regional plan is amended pursuant to subdivision (c) of Article V, or until May 1, 1983, whichever is earlier:

(1) Except as otherwise provided in this paragraph, no new subdivision, planned unit development, or condominium project may be approved unless a complete tentative map or plan has been approved before the effective date of the amendments to this compact by all agencies having jurisdiction. The subdivision of land

owned by a general improvement district, which existed and owned the land before the effective date of the amendments to this compact, may be approved if subdivision of the land is necessary to avoid insolvency of the district.

(2) Except as provided in paragraph (3), no apartment building may be erected unless the required permits for such building have been secured from all agencies having jurisdiction, prior to the effective date of the amendments to this compact.

(3) During each of the calendar years 1980, 1981, and 1982 no city or county may issue building permits which authorize the construction of a greater number of new residential units within the region than were authorized within the region by building permits issued by that city or county during calendar year 1978. For the period of January through April, 1983 building permits authorizing the construction of no more than 1/3 of that number may be issued by each such city or county. For purposes of this paragraph a "residential unit" means either a single family residence or an individual residential unit within a larger building, such as an apartment building, a duplex or a condominium.

The Legislatures find the respective numbers of residential units authorized within the region during calendar year 1978 to be as follows:

1. City of South Lake Tahoe and El Dorado County (combined)..... 252
2. Placer County..... 278
3. Carson City..... 0
4. Douglas County..... 339
5. Washoe County 739

(4) During each of the calendar years 1980, 1981 and 1982, no city or county may issue building permits which authorize construction of a greater square footage of new commercial buildings within the region than were authorized within the region by building permits for commercial purposes issued by that city or county during the calendar year 1978. For the period of January through April, 1983 building permits authorizing the construction of no more than 1/3 the amount of that square footage may be issued by each such city or county.

The Legislatures find the respective square footages of commercial buildings authorized within the region during calendar year 1978 to be as follows:

1. City of South Lake Tahoe and El Dorado County (combined) 64,324
2. Placer County 23,000
3. Carson City 0
4. Douglas County 57,354
5. Washoe County 50,600

(5) No structure may be erected to house gaming under a nonrestricted license.

(6) No facility for the treatment of sewage may be constructed or enlarged except:

(A) To comply, as ordered by the appropriate state agency for the control of water pollution, with existing limitations of effluence under the Clean Water Act, 33 U.S.C. § 1251 et seq., and the applicable state law for control of water pollution; or

(B) To accommodate development which is not prohibited or limited by this subdivision; or

(C) In the case of Douglas County Sewer District #1, to modify or otherwise alter sewage treatment facilities existing on the effective date of the amendments to this compact so that such facilities will be able to treat the total volume of effluence for which they were originally designed which is 3.0 mgd. Such modification or alteration is not a "project"; is not subject to the requirements of Article VII; and does not require a permit from the agency. Before commencing such modification or alternative, however, the district shall submit to the agency its report identifying any significant soil erosion problems which may be caused by such modifications or alterations and the measures which the district proposes to take to mitigate or avoid such problems.

The moratorium imposed by this subdivision does not apply to work done pursuant to a right vested before the effective date of the amendments to this compact. Notwithstanding the expiration date of the moratorium imposed by this subdivision, no new highway may be built or existing highway widened to accommodate additional continuous lanes for automobiles until the regional transportation plan is revised and adopted.

The moratorium imposed by this subdivision does not apply to the construction of any parking garage which has been approved by the agency prior to May 4, 1979, whether that approval was affirmative or by default. The provisions of this paragraph are not an expression of legislative intent that any such parking garage, the approval of which is the subject of litigation

which was pending on the effective date of the amendments to this compact, should, or should not, be constructed. The provisions of this paragraph are intended solely to permit construction of such a parking garage if judgment sustaining the agency's approval to construct that parking garage has become final and no appeal is pending or may lawfully be taken to a higher court.

(d) Subject to the final order of any court of competent jurisdiction entered in litigation contesting the validity of an approval by the Tahoe Regional Planning Agency, whether that approval was affirmative or by default, if that litigation was pending on May 4, 1979, the agency and the States of California and Nevada shall recognize as a permitted and conforming use:

(1) Every structure housing gaming under a nonrestricted license which existed as a licensed gaming establishment on May 4, 1979, or whose construction was approved by the Tahoe Regional Planning Agency affirmatively or deemed approved before that date. The construction or use of any structure to house gaming under a nonrestricted license not so existing or approved, or the enlargement in cubic volume of any such existing or approved structure is prohibited.

(2) Every other nonrestricted gaming establishment whose use was seasonal and whose license was issued before May 4, 1979, for the same season and for the number and type of games and slot machines on which taxes or fees were paid in the calendar year 1978.

(3) Gaming conducted pursuant to a restricted gaming license issued before May 4, 1979, to the extent permitted by that license on that date.

The area within any structure housing gaming under a nonrestricted license which may be open to public use (as distinct from that devoted to the private use of guests and exclusive of any parking area) is limited to the area existing or approved for public use on May 4, 1979. Within these limits, any external modification of the structure which requires a permit from a local government also requires approval from the agency. The agency shall not permit restaurants, convention facilities, showrooms or other public areas to be constructed elsewhere in the region outside the structure in order to replace areas existing or approved for public use on May 4, 1979.

(e) Any structure housing licensed gaming may be rebuilt or replaced to a size not to exceed the cubic volume, height and land coverage existing or approved on May 4, 1979, without the review or approval of the agency or any planning or regulatory authority of the State of Nevada whose review or approval would be required for a new structure.

(f) The following provisions apply to any internal or external modification, remodeling, change in use, or repair of a structure housing gaming under a nonrestricted license which is not prohibited by article VI(d):

(1) The agency's review of an external modification of the structure which requires a permit from a local government is limited to determining whether the external modification will do any of the following:

(A) Enlarge the cubic volume of the structure;

(B) Increase the total square footage of area open to or approved for public use on May 4, 1979;

(C) Convert an area devoted to the private use of guests to an area open to public use;

(D) Increase the public area open to public use which is used for gaming beyond the limits contained in paragraph (3); and

(E) Conflict with or be subject to the provisions of any of the agency's ordinances that are generally applicable throughout the region.

The agency shall make this determination within 60 days after the proposal is delivered to the agency in compliance with the agency's rules or regulations governing such delivery unless the applicant has agreed to an extension of this time limit. If an external modification is determined to have any of the effects enumerated in subparagraphs (A) through (C), it is prohibited. If an external modification is determined to have any of the effects enumerated in subparagraphs (D) or (E), it is subject to the applicable provisions of this compact. If an external modification is determined to have no such effect, it is not subject to the provisions of this compact.

(2) Except as provided in paragraph (3), internal modification, remodeling, change in use or repair of a structure housing gaming under a nonrestricted license is not a project and does not require the review or approval of the agency.

(3) Internal modification, remodeling, change in use or repair of areas open to the public use within a structure housing gaming

under a nonrestricted license which alone or in combination with any other such modification, remodeling, change in use or repair will increase the total portion of those areas which are used for gaming by more than the product of the total base area, as defined below, in square feet existing on or approved before August 4, 1980, multiplied by 15 percent constitutes a project and is subject to all of the provisions of this compact relating to projects. For purposes of this paragraph and the determination required by subdivision (g), base area means all of the area within a structure housing gaming under a nonrestricted license which may be open to public use, whether or not gaming is actually conducted or carried on in that area, except retail stores, convention centers and meeting rooms, administrative offices, kitchens, maintenance and storage areas, rest rooms, engineering and mechanical rooms, accounting rooms and counting rooms.

(g) In order to administer and enforce the provisions of subdivisions (d), (e) and (f), the State of Nevada, through its appropriate planning or regulatory agency, shall require the owner or licensee of a structure housing gaming under a nonrestricted license to provide:

(1) Documents containing sufficient information for the Nevada agency to establish the following relative to the structure:

(A) The location of its external walls;

(B) Its total cubic volume;

(C) Within its external walls, the area in square feet open or approved for public use and the area in square feet devoted to or approved for the private use of guests on May 4, 1979;

(D) The amount of surface area of land under the structure; and

(E) The base area as defined in paragraph (3) of subdivision (f) in square feet existing on or approved before August 4, 1980.

(2) An informational report whenever any internal modification, remodeling, change in use, or repair will increase the total portion of the areas open to public use which is used for gaming.

The Nevada agency shall transmit this information to the Tahoe Regional Planning Agency.

(h) Gaming conducted pursuant to a restricted gaming license is exempt from review by the agency if it is incidental to the primary use of the premises.

(i) The provisions of subdivisions (d) and (e) are intended only to limit gaming and related activities as conducted within a gaming establishment, or construction designed to permit the enlargement of such activities, and not to limit any other use of property zoned for commercial use or the accommodation of tourists, as approved by the agency.

(j) Legal actions arising out of or alleging a violation of the provisions of this compact, of the regional plan or of an ordinance or regulation of the agency or of a permit or a condition of a permit issued by the agency are governed by the following provisions:

(1) This subdivision applies to:

(A) Actions arising out of activities directly undertaken by the agency.

(B) Actions arising out of the issuance to a person of a lease, permit, license or other entitlement for use by the agency.

(C) Actions arising out of any other act or failure to act by any person or public agency.

Such legal actions may be filed and the provisions of this subdivision apply equally in the appropriate courts of California and Nevada and of the United States.

(2) Venue lies:

(A) If a civil or criminal action challenges an activity by the agency or any person which is undertaken or to be undertaken upon a parcel of real property, in the state or federal judicial district where the real property is situated.

(B) If an action challenges an activity which does not involve a specific parcel of land (such as an action challenging an ordinance of the agency), in any state or federal court having jurisdiction within the region.

(3) Any aggrieved person may file an action in an appropriate court of the State of California or Nevada or of the United States alleging noncompliance with the provisions of this compact or with an ordinance or regulation of the agency. In the case of governmental agencies, "aggrieved person" means the Tahoe Regional Planning Agency or any state, federal or local agency. In the case of any person other than a governmental agency who challenges an action of the Tahoe Regional Planning Agency, "aggrieved person" means any person who has appeared, either in person, through an authorized representative, or in writing, before the agency at an appropriate administrative hearing

to register objection to the action which is being challenged, or who had good cause for not making such an appearance.

(4) A legal action arising out of the adoption or amendment of the regional plan or of any ordinance or regulation of the agency, or out of the granting or denial of any permit, shall be commenced within 60 days after final action by the agency. All other legal actions shall be commenced within 65 days after discovery of the cause of action.

(5) In any legal action filed pursuant to this subdivision which challenges an adjudicatory act or decision of the agency to approve or disapprove a project, the scope of judicial inquiry shall extend only to whether there was prejudicial abuse of discretion. Prejudicial abuse of discretion is established if the agency has not proceeded in a manner required by law or if the act or decision of the agency was not supported by substantial evidence in light of the whole record. In making such a determination the court shall not exercise its independent judgment on evidence but shall only determine whether the act or decision was supported by substantial evidence in light of the whole record. In any legal action filed pursuant to this subdivision which challenges a legislative act or decision of the agency (such as the adoption of the regional plan and the enactment of implementing ordinances), the scope of the judicial inquiry shall extend only to the questions of whether the act or decision has been arbitrary, capricious or lacking substantial evidentiary support or whether the agency has failed to proceed in a manner required by law.

(6) The provisions of this subdivision do not apply to any legal proceeding pending on

the date when this subdivision becomes effective. Any such legal proceeding shall be conducted and concluded under the provisions of law which were applicable prior to the effective date of this subdivision.

(7) The security required for the issuance of a temporary restraining order or preliminary injunction based upon an alleged violation of this compact or any ordinance, plan, rule or regulation adopted pursuant thereto is governed by the rule or statute applicable to the court in which the action is brought unless the action is brought by a public agency or political subdivision to enforce its own rules, regulations and ordinances in which case no security shall be required.

(k) The agency shall monitor activities in the region and may bring enforcement actions in the region to ensure compliance with the regional plan and adopted ordinances, rules, regulations and policies. If it is found that the regional plan, or ordinances, rules, regulations and policies are not being enforced by a local jurisdiction, the agency may bring action in a court of competent jurisdiction to ensure compliance.

(l) Any person who violates any provision of this compact or of any ordinance or regulation of the agency or of any condition of approval imposed by the agency is subject to a civil penalty not to exceed five thousand dollars ($5,000). Any such person is subject to an additional civil penalty not to exceed five thousand dollars ($5,000) per day, for each day on which such a violation persists. In imposing the penalties authorized by this subdivision, the court shall consider the nature of the violation and shall impose a greater penalty if it was

willful or resulted from gross negligence than if it resulted from inadvertence or simple negligence.

(m) The agency is hereby empowered to initiate, negotiate and participate in contracts and agreements among the local governmental authorities of the region, or any other intergovernmental contracts or agreements authorized by state or federal law.

(n) Each intergovernmental contract or agreement shall provide for its own funding and staffing, but this shall not preclude financial contributions from the local authorities concerned or from supplementary sources.

(o) Every record of the agency, whether public or not, shall be open for examination to the Legislature and Controller of the State of California and the Legislative Auditor of the State of Nevada.

(p) Approval by the agency of any project expires 3 years after the date of final action by the agency or the effective date of the amendments to this compact, whichever is later, unless construction is begun within that time and diligently pursued thereafter, or the use or activity has commenced. In computing the 3-year period any period of time during which the project is the subject of a legal action which delays or renders impossible the diligent pursuit of that project shall not be counted. Any license, permit or certificate issued by the agency which has an expiration date shall be extended by that period of time during which the project is the subject of such legal action as provided in this subdivision.

(q) The governing body shall maintain a current list of real property known to be available for exchange with

the United States or with other owners of real property in order to facilitate exchanges of real property by owners of real property in the region.

ARTICLE VII. ENVIRONMENTAL IMPACT STATEMENTS

(a) The Tahoe Regional Planning Agency when acting upon matters that have a significant effect on the environment shall:

(1) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(2) Prepare and consider a detailed environmental impact statement before deciding to approve or carry out any project. The detailed environmental impact statement shall include the following:

(A) The significant environmental impacts of the proposed project;

(B) Any significant adverse environmental effects which cannot be avoided should the project be implemented;

(C) Alternatives to the proposed project;

(D) Mitigation measures which must be implemented to assure meeting standards of the region;

(E) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity;

(F) Any significant irreversible and irretrievable commitments of resources which would be involved in the proposed project should it be implemented; and

(G) The growth-inducing impact of the proposed project;

(3) Study, develop and describe appropriate alternatives to recommended courses of action for any project which involves unresolved conflicts concerning alternative uses of available resources;

(4) Make available to states, counties, municipalities, institutions and individuals, advice and information useful in restoring, maintaining and enhancing the quality of the region's environment; and

(5) Initiate and utilize ecological information in the planning and development of resource-oriented projects.

(b) Prior to completing an environmental impact statement, the agency shall consult with and obtain the comments of any federal, state or local agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate federal, state and local agencies which are authorized to develop and enforce environmental standards shall be made available to the public and shall accompany the project through the review processes. The public shall be consulted during the environmental impact statement process and views shall be solicited during a public comment period not to be less than 60 days.

(c) Any environmental impact statement required pursuant to this article need not repeat in its entirety any

information or data which is relevant to such a statement and is a matter of public record or is generally available to the public, such as information contained in an environmental impact report prepared pursuant to the California Environmental Quality Act or a federal environmental impact statement prepared pursuant to the National Environmental Policy Act of 1969. However, such information or data shall be briefly described in the environmental impact statement and its relationship to the environmental impact statement shall be indicated.

In addition, any person may submit information relative to a proposed project which may be included, in whole or in part, in any environmental impact statement required by this article.

(d) In addition to the written findings specified by agency ordinance to implement the regional plan, the agency shall make either of the following written findings before approving a project for which an environmental impact statement was prepared:

> (1) Changes or alterations have been required in or incorporated into such project which avoid or reduce the significant adverse environmental effects to a less than significant level; or
>
> (2) Specific considerations, such as economic, social or technical, make infeasible the mitigation measures or project alternatives discussed in the environmental impact statement on the project.

A separate written finding shall be made for each significant effect identified in the environmental impact

statement on the project. All written findings must be supported by substantial evidence in the record.

(e) The agency may charge and collect a reasonable fee from any person proposing a project subject to the provisions of this compact in order to recover the estimated costs incurred by the agency in preparing an environmental impact statement under this article.

(f) The agency shall adopt by ordinance a list of classes of projects which the agency has determined will not have a significant effect on the environment and therefore will be exempt from the requirement for the preparation of an environmental impact statement under this article. Prior to adopting the list, the agency shall make a written finding supported by substantial evidence in the record that each class of projects will not have a significant effect on the environment.

ARTICLE VIII. FINANCES

(a) On or before September 30 of each calendar year the agency shall establish the amount of money necessary to support its activities for the next succeeding fiscal year commencing July 1 of the following year. The agency shall apportion $75,000 of this amount among the counties within the region on the same ratio to the total sum required as the full cash valuation of taxable property within the region in each county bears to the total full cash valuation of taxable property within the region. In addition, each county within the region in California shall pay $18,750 to the agency and each county within the region in Nevada, including Carson City, shall pay $12,500 to the agency, from any funds available therefore.

The State of California and the State of Nevada may pay to the agency by July 1, of each year any additional sums necessary to support the operations of the agency pursuant to this compact. If additional funds are required, the agency shall make a request for the funds to the States of California and Nevada. Requests for state funds must be apportioned two-thirds from California and one-third from Nevada. Money appropriated shall be paid within 30 days.

(b) The agency may fix and collect reasonable fees for any services rendered by it.

(c) The agency shall submit an itemized budget to the states for review with any request for state funds, shall be strictly accountable to any county in the region and the states for all funds paid by them to the agency and shall be strictly accountable to all participating bodies for all receipts and disbursement.

(d) The agency is authorized to receive gifts, donations, subventions, grants, and other financial aids and funds; but the agency may not own land except as provided in subdivision (i) of Article III.

(e) The agency shall not obligate itself beyond the moneys due under this article for its support from the several counties and the states for the current fiscal year, plus any moneys on hand or irrevocably pledged to its support from other sources. No obligation contracted by the agency shall bind either of the party states or any political subdivision thereof.

ARTICLE IX. TRANSPORTATION DISTRICT

(a) The Tahoe transportation district is hereby established as a special purpose district. The boundaries of the district are coterminous with those of the region.

(b) The business of the district shall be managed by a board of directors consisting of:

(1) One member of the county board of supervisors of each of the counties of El Dorado and Placer;

(2) One member of the city council of the City of South Lake Tahoe;

(3) One member each of the board of county commissioners of Douglas County and of Washoe County;

(4) One member of the board of supervisors of Carson City.

(c) The vote of at least four of the directors must agree to take action. If at least four votes in favor of an action are not cast, an action of rejections shall be deemed to have been taken.

(d) The Tahoe transportation district may in accordance with the adopted transportation plan:

(1) Own and operate a public transportation system to the exclusion of all other publicly owned transportation systems in the region.

(2) Acquire upon mutually agreeable terms any public transportation system or facility owned by a county, city or special purpose district or any privately owned transportation system or facility within the region.

(3) Hire the employees of existing public transportation systems that are acquired by the

district without loss of benefits to the employees, bargain collectively with employee organizations, and extend pension and other collateral benefits to employees.

(4) Fix the rates and charges for transit services provided pursuant to this subdivision.

(5) Issue revenue bonds and other evidence of indebtedness.

(6) By resolution, determine and propose for adoption a tax for the purpose of obtaining services of the district. The tax proposed must be general and of uniform operation throughout the region, and may not be graduated in any way. The district is prohibited from imposing an ad valorem tax, a tax measured by gross or net receipts on business, a tax or charge that is assessed against people or vehicles as they enter or leave the region, and any tax, direct or indirect, on gaming tables and devices.

Any such proposition must be submitted to the voters of the district and shall become effective upon approval of a majority of the voters voting on the proposition. The revenues from any such tax must be used for the services for which it was imposed, and for no other purpose.

(7) Provide service from inside the region to convenient airport, railroad and interstate bus terminals without regard to the boundaries of the region.

(e) The Legislatures of the States of California and Nevada may, by substantively identical enactments, amend this article.

ARTICLE X. MISCELLANEOUS

(a) It is intended that the provisions of this compact shall be reasonably and liberally construed to effectuate

the purposes thereof. Except as provided in subdivision (c), the provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining state and in full force and effect as to the state affected as to all severable matters.

(b) The agency shall have such additional powers and duties as may hereafter be delegated or imposed upon it from time to time by the action of the Legislature of either state concurred in by the Legislature of the other.

(c) A state party to this compact may withdraw therefrom by enacting a statute repealing the compact. Notice of withdrawal shall be communicated officially and in writing to the Governor of the other state and to the agency administrators. This provision is not severable, and if it is held to be unconstitutional or invalid, no other provision of this compact shall be binding upon the State of Nevada or the State of California.

(d) No provision of this compact shall have any effect upon the allocation, distribution or storage of interstate waters or upon any appropriate water right.

Sec. 2. The Secretary of Agriculture and the heads of other appropriate agencies are authorized, upon the request of the Tahoe Regional Planning Agency, to cooperate with the Tahoe Regional Planning Agency in all respects compatible with carrying out the normal duties of their agencies.

Sec. 3. The consent to the compact by the United States is subject to the condition that the President may appoint a nonvoting representative of the United States to the governing body of the Tahoe Regional Planning Agency.

Sec. 4. Any additional powers conferred on the agency pursuant to article X, section 1(b) of the compact shall not be exercised unless consented to by the Congress.

Sec. 5. Nothing contained in this Act or in the compact consented to shall in any way affect the powers, rights, or obligations of the United States, or the applicability of any law or regulation of the United States in, over or to the region or waters which are the subject of the compact, or in any way affect rights owned or held by or for Indians or Indian tribes subject to the jurisdiction of the United States.

Sec. 6. The right is hereby reserved by the Congress or any of its standing committees to require the disclosure and furnishing of such information and data by or concerning the Tahoe Regional Planning Agency as is deemed appropriate by the Congress or such committee.

Sec. 7. The right to alter, amend, or repeal this Act is hereby expressly reserved.

Approved December 19, 1980.

(State codifications: Calif. Government Code § 66801; Nevada N.R.S. 277.200.)

(PARTIAL) LISTING OF INTERSTATE COMPACTS[1]

BRIDGES, NAVIGATION, AND PORT AUTHORITIES

Buffalo and Fort Erie Bridge Compact, 16 Stat. 173 (1870)

Delaware River and Bay Authority Compact, P.L., 87-678 (1962)

Delaware River Joint Toll Bridge Compact, 49 Stat. 1051, 1058 (1935)

Delaware River Port Authority Compact, 47 Stat. 308 (1932)

Lake Champlain Bridge Compact, 45 Stat. 120-128 (1928)

Missouri River Toll Bridge Compact, 48 Stat. 105 (1933)

New Jersey - Pennsylvania Turnpike Bridge Compact, 65 Stat. 650 (1951)

New York - New Jersey Port Authority Compact, 42 Stat. 174 (1921)

Ogdensburg Bridge and Port Authority Compact, P.L. 81-722 (1950)

Portsmouth - Kittery Bridge Compact, 50 Stat. 535 (1937)

Tennessee - Tombigbee Waterway Development Compact, 72 Stat. 609 (1958)

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[1] For sake of brevity, only Congressional ratification of each compact is cited. For a comprehensive listing of *state* legislation applicable to each compact, see *Interstate Compacts and Agencies* (Council of State Governments 1983).

CONSERVATION AND ENVIRONMENT

Atlantic States Marine Fisheries Compact, 56 Stat. 267 (1942)

Columbia River Compact, 40 Stat. 515 (1918)

Gulf States Marine Fisheries Compact, 63 Stat. 70 (1949)

Interstate Mining Compact Interstate Oil and Gas Compact, Public Res. No. 64 (1935)

Middle Atlantic Forest Fire Protection Compact, P.L. 790 (1956)

Northeastern Forest Fire Protection Compact, 61 Stat. 419 (1947)

Potomac River Compact of 1958, 76 Stat. 797 (1962)

South Central Forest Fire Protection Compact, 68 Stat. 783 (1954)

Southeastern Forest Fire Protection Compact, 68 Stat. 563 (1954)

CORRECTIONS AND CRIME CONTROL

Interstate Compact on Juveniles, 48 Stat. 909 (1934)

Interstate Corrections Compact, 48 Stat. 909 (1934)

New England Corrections Compact, 48 Stat. 909 (1934)

New England Police Compact, 48 Stat. 909 (1934) (consent)

Interstate Compact for the Supervision of Parolees and Probationers, 48 Stat. 909 (1934)

Waterfront Commission Compact, 67 Stat. 541 (1953)

Western Corrections Compact, 48 Stat. 909 (1934)

EDUCATION

New England Higher Education Compact, P.L. 719-83 (1954)

New Hampshire - Vermont Interstate School Compact, P.L. 91-21 (1969)

New Hampshire - Vermont School District Compact (Hanover - Norwich), 77 Stat. 332 (1963)

Western Regional Education Compact, 67 Stat. 490 (1953)

HEALTH

Compact on Mental Health, P.L. 92-280 (1972)

MOTOR VEHICLES
(DRIVER LICENSE, SAFETY AND TRAFFIC VIOLATION)

Driver License Compact, 72 Stat. 635 (1958)

Vehicle Equipment Safety Compact, 72 Stat. 635 (1958)

MOTOR VEHICLES
(FEES AND TAXATION)

Compact on Motor Fuels Consumed by Interstate Buses, P.L. 89-11 (1965)

NUCLEAR ENERGY

Central Interstate Low-Level Radioactive Waste Compact, P.L. 99-240, 99 Stat. 1859, 1863 (1986)

Southern Interstate Energy Compact, 76 Stat. 249 (1962)

Southwestern Low-Level Radioactive Waste Disposal Compact, 42 U.S.C. § 2021d

PARKS AND RECREATION

Breaks Interstate Park Compact, 67 Stat. 584 (1953); 68 Stat. 571 (1954)

Cumbres and Toltec Scenic Railroad Compact, 88 Stat. 1421 (1963)

Falls of the Ohio Interstate Park Compact, P.L. 93-137 (1981)

Pymatuning Lake Compact, 50 Stat. 865 (1937)

PLANNING AND DEVELOPMENT

Delaware Valley Urban Area Compact, 75 Stat. 170 (1961)

Kansas - Missouri Waterworks Compact, 42 Stat. 1058 (1922)

Tahoe Regional Planning Compact, P.L. 96-551, 94 Stat. 3233 (1980)

PUBLIC SAFETY

Civil Defense and Disaster Compact, 64 Stat. 1245 (1950)

Mutual Military and Compact, 66 Stat. 315 (1952); 70 Stat. 247 (1956)

TRANSPORTATION

Kansas City Area Transportation Compact (Kansas - Missouri), P.L. 89-599 (1966) and P.L. 90-395 (1968)

Railroad Passenger Transportation Compact (Connecticut - New York), P.L. 91-160 (1969)

Washington Metropolitan Area Transit Authority Compact, 80 Stat. 1324 (1966)

Washington Metropolitan Area Transit Regulation Compact, 74 Stat. 1031 (1960)

WATER APPORTIONMENT

Animas - La Plata Project Compact, P.L. 90-537 (1968)

Arkansas River Basin Compact of 1970 (Arkansas - Oklahoma), 87 Stat. 569 (1973)

Arkansas River Compact of 1949, 63 Stat. 145-152 (1949)

Arkansas River Compact of 1965 (Kansas - Oklahoma), P.L. 789 (1966)

Bear River Compact, 72 Stat. 38 (1958)

Belle Fourche River Compact, 58 Stat. 94 (1944)

Big Blue River Compact, 86 Stat. 193 (1971)

Canadian River Compact, 64 Stat. 93 (1950); 66 Stat. 74 (1952)

Colorado River Compact, 45 Stat. 1057-64 (1928)

Costilla Creek Compact, 60 Stat. 246 (1946); 77 Stat. 350 (1963)

Klamath River Compact, 69 Stat. 613 (1955); 71 Stat. 497 (1957)

La Plata River Compact, 43 Stat. 796 (1925)

Pecos River Compact, 63 Stat. 159 (1949)

Red River Compact, P.L. 96-564 (1955)

Republican River Compact, P.L. 78-60 (1943)

Rio Grande Interstate Compact, 53 Stat. 785 (1939)

Sabine River Compact, 65 Stat. 736 (1951); 68 Stat. 690 (1954)

Snake River Compact, 62 Stat. 294 (1943); 64 Stat. 29 (1950)

South Platte River Compact, 44 Stat. 195 (1926)

Upper Colorado River Basin Compact, 63 Stat. 31 (1949)

Upper Niobrara River Compact, 83 Stat. 86 (1969)

Yellowstone River Compact, 63 Stat. 152 (1949); 65 Stat. 663 (1951)

WATER POLLUTION CONTROL

New England Interstate Water Pollution Control Compact, P.L. 80-292 (1947)

New Hampshire - Vermont Interstate Sewage and Waste Disposal Facilities Compact, 90 Stat. 1221 (1976)

Ohio River Valley Water Sanitation Compact, P.L. 76-739 (1940)

Tri-State Sanitation Compact, Public Res. 62, 74th Cong. (1935)

WATER RESOURCES AND FLOOD CONTROL

Connecticut River Valley Flood Control Compact, 67 Stat. 45 (1953)

Delaware River Basin Compact, 75 Stat. 688 (1961)

Great Lakes Basin Compact, 82 Stat. 414 (1968)

Potomac Valley Compact, 54 Stat. 748 (1940); 84 Stat. 856 (1970)

Susquehanna River Basin Compact, P.L. 91-575, 84th Congress (1968)

Thames River Flood Control Compact, 72 Stat. 364 (1958)

Wheeling Creek Watershed Protection and Flood Prevention Compact, 81 Stat. 553 (1967)

Supreme Court, U.S.
FILED
MAR 1 1995
OFFICE OF THE CLERK

No. 94-1311

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1994

STATE OF CALIFORNIA, STATE OF NEVADA AND TAHOE REGIONAL PLANNING AGENCY,

Petitioners,

v.

TAHOE SIERRA PRESERVATION COUNCIL, ET AL.,

Respondents.

On Petition For a Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I STATEMENT OF THE CASE 1

A. Nature of the Case 1
B. Proceedings Below 4

II SUMMARY OF ARGUMENT 11

III REASONS FOR DENYING THE WRIT . . . 12

A. The TRPA Compact's 60-Day Statute of Limitations is Clearly Inapplicable on its Face to § 1983 Claims 12

B. The Ninth Circuit Properly Found the Compact's 60-Day Statutes of Limitations Should Not be Applied to Bar Each Bite-Size Piece of the Plaintiffs' Takings Claim 14

C. The Compact's 60-Day Statute of Limitations is Not the *Single* Statute of Limitations Applicable to *All* § 1983 Claims As Mandated by *Wilson v. Garcia* 18

D. The Purported Conflict with Other Circuit Court Decisions is Simply Made of Whole Cloth 21

IV CONCLUSION 23

TABLE OF AUTHORITIES

Cases: **Page**

American Pipe and Const. Co. v. Utah,
414 U.S. 538 (1974) 13

Azul-Pacifico, Inc. v. City of Los Angeles,
973 F.2d 704 (9th Cir. 1992), cert. den.,
___ U.S. ___, 113 S.Ct. 1049 (1993) 9

Edwards v. Fresno Community Hospital,
38 Cal.App.3d 702 (1974) 13

First English Evang. Lutheran Church v. Co. of Los Angeles,
482 U.S. 804 (1987) 8

Gibson v. United States,
781 F.2d 1334 (9th Cir. 1986) 20

Gordon v. City of Warren,
579 F.2d 386 (6th Cir. 1978) 16

Hess v. Port Authority Trans-Hudson Corp.,
_____ U.S. ____, 115 S.Ct. 394 (1994) 19, 21

Lake Country Estates v. TRPA,
440 U.S. 391 (1979) 19

Lockary v. Kayfetz,
587 F.Supp. 631 (N.D.CA 1984) 16

TABLE OF AUTHORITIES - Continued

Page

Lucas v. So. Carolina Coastal Commission,
____ U.S. ____, 112 S.Ct. 2886 (1992) 8

Mason v. Schaub,
564 F.2d 308 (9th Cir. 1977) 20

Pierpont Inn, Inc. v. State of California,
70 Cal.2d 282 (1969) 16

Rao v. Port of New York,
222 F.2d 362 (2d Cal. 1955) 22

Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, [*TSPC I*]
911 F.2d 1331 (9th Cir. 1990), *cert. denied*,
499 U.S. 943 (1991), the Nevada-side case 3, 5, 8, 14, 18

Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, [*TSPC II*]
938 F.2d 153 (9th Cir. 1991), the California-side case 5, 8, 10

United States v. Dickinson,
331 U.S. 745 (1947) 10, 15, 16, 17

Wilson v. Garcia,
471 U.S. 261 (1985) 9, 11, 18, 19, 20, 21, 22

TABLE OF AUTHORITIES - Continued

United States Constitution **Page**

Article I, § 10 19

Fifth Amendment . . . . . Throughout

Eleventh Amendment 23

Fourteenth Amendment . . . . . Throughout

Statutes

42 U.S.C. § 1983 . . . . . Throughout

TRPA Compact

Art. VI(j)(2)(A) 2

Art. VI(j)(4) 7, 12, 14

I

STATEMENT OF THE CASE

A. Nature of the Case

This case is about 560 individual plaintiffs who many years ago purchased one or more vacant single-family lots located in established residential subdivisions on both the California and Nevada sides of the Lake Tahoe Basin, with the expectation of one day building their retirement, vacation, or permanent homes. Their dreams were later shattered when TRPA subsequently enacted a series of back-to-back moratoria and regulations, purportedly in the name of water clarity protection, that effectively prevented the plaintiffs from making any viable or reasonable use of their vacant homesites. In large measure, the 428 properties which remain at issue in this litigation are vacant lots, 1/4 to 1/3 acre in size, zoned only for single-family residences, are located in established residential neighborhoods in which a great many homes already have been built, and are served by paved roads, sewers, water service, and other necessary utilities.[1]

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[1] Several parcels are owned by more than one plaintiff, such as a husband and wife or a family owning a single parcel. The majority of the plaintiffs are senior citizens who had planned to build their retirement homes at Lake Tahoe. Since the action was first filed in 1984, approximately twenty of the original plaintiffs have died, and many others have chosen to dismiss their claims following the forced sale of their properties to one of the various public "buy-out" programs operating in the Tahoe Basin. In the California-side case, there remain 294 named-plaintiffs owning 258 properties on the California side of the Tahoe Basin; in the Nevada-side case, there remain 266 named-plaintiffs owning 170 properties on the Nevada side of the Tahoe Basin.

The twin Complaints in this matter were originally simultaneously filed in the Federal District Courts for Nevada and the Eastern District of California on June 25, 1984[2], more than ten years ago. This litigation has been pending since that time, but has not yet gone to trial. In their original Complaints, and in the subsequent First Amended Complaints filed after this matter was heard and remanded by the Ninth Circuit to the District Courts in 1991 as explained below, the plaintiffs alleged that all viable use of their properties was "taken" by the petitioner Tahoe Regional Planning Agency ("TRPA") by its enactment of a series of back-to-back ***interim*** and then ***permanent*** land-use moratoria and regulations during the 1980s which had the immediate effect of prohibiting any viable use of plaintiffs' properties. Plaintiffs now stand before the Court seeking Just Compensation under the Fifth and Fourteenth Amendments of the Constitution.

It is further alleged in their Complaints that the plaintiffs acquired their properties before TRPA suddenly decided in 1981, based on new-found environmental wisdom, to classify their properties as "environmentally sensitive" and to prohibit all reasonable use of those properties. Further it is alleged that at the time the plaintiffs acquired their properties (all were acquired before 1981), they had no

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[2] Article VI(j)(2)(A) of the TRPA Compact provides: "Venue lies . . . in the state or federal judicial district where the real property is situated." P.L. 96-551, 94 Stat. 3233 at Art.VI(j). Thus, two separate and nearly identical Complaints were originally filed in this case (and subsequently amended): one in the Nevada District Court applicable to the claims of those plaintiffs who own property located in the State of Nevada, and the other in the Eastern District of California applicable to the plaintiffs who own property located in the State of California.

knowledge that TRPA intended subsequently to preclude all reasonable use of their properties based on new environmental requirements. It is also alleged that the regulations at issue initially included an "interim moratorium" (TRPA's Ordinance 81-5) first adopted on June 25, 1981, which imposed the first ***temporary*** moratorium on the plaintiffs' use of their property while TRPA was purportedly adopting its required environmental thresholds and new regional plan mandated by the 1980 amendments to TRPA's Compact. Subsequently, that moratorium was extended by an additional eight-month ***temporary*** moratorium imposed by the TRPA Governing Board pursuant to its Resolution 83-21 adopted on August 26, 1983. Thereafter, in June, 1984 (34 months after the initial temporary moratorium was imposed), and over the vigorous protests of the plaintiffs, the TRPA finally adopted its ***permanent*** 1984 Regional Plan, by which it then made permanent the previous ***temporary*** prohibitions on use that had been adopted pursuant to Ordinance 81-5 and Resolution 83-21.

Within 60 days of the adoption of that 1984 Regional Plan which, to use the words of the Ninth Circuit in ***TSPC I*** (*see infra*, p.5), "made permanent" the predecessor temporary prohibitions on the use of the plaintiffs' properties, the plaintiffs filed their twin Complaints. Since that time, TRPA and the Attorneys General of the States of California and Nevada have vigorously defended against those lawsuits, seeking to justify TRPA's total prohibitions on the use of plaintiffs' properties, and arguing that TRPA was not required to pay Just Compensation to the plaintiffs.

At the same time these lawsuits were originally filed, TRPA was also sued in a separate action by others including the California Attorney General who contended that TRPA's 1984 Regional Plan did not go far enough in restricting

development on other properties in the Tahoe Basin. As a result of that separate lawsuit and in response to a TRO and Preliminary Injunction issued in that lawsuit, TRPA finally agreed to rewrite its 1984 Regional Plan. On June 25, 1987, in the midst of the first appeals to the Ninth Circuit in the instant lawsuits, TRPA adopted still another replacement Regional Plan (its 1987 Plan), which plaintiffs contend continued in full force and effect the very same prohibitions on the use of their properties at issue in the 1984 Plan, thus further extending the period of the takings triggered by the 1984 Plan and the predecessor interim regulations.

In brief, plaintiffs alleged with specificity in their detailed Complaints, and are prepared to prove at trial if finally given the opportunity, that by virtue of the back-to-back regulatory measures imposed by TRPA throughout the 1980s, they were denied all economically viable use of their single-family homesites continuously from June 25, 1981 up to and including the present, or, in the case of a few specified plaintiffs, until their properties were specifically reclassified by TRPA in 1989-90 as "buildable". The plaintiffs further alleged that they have not been offered nor received Just Compensation from TRPA for the taking of their properties, and that TRPA has denied their repeated requests for such Just Compensation.

B. Proceedings Below

For over ten years, plaintiffs have struggled for nothing more nor less than the right to have their day in court, and to have their cases resolved on their merits. They have been locked in a massive litigation battle with TRPA -- and its two partner states -- which have vigorously defended TRPA's right to impose the regulatory prohibitions at issue without compensating the plaintiffs, and have to date

prevented the plaintiffs from having their cases tried and resolved on the merits. Twice at the request of TRPA and its partner states the two district courts dismissed the respective cases on various ripeness, mootness, and related procedural grounds, and twice plaintiffs appealed to the Ninth Circuit. Twice the Ninth Circuit saw fit to reinstate substantial portions of the plaintiffs' claims and remanded the cases to the district courts so that the plaintiffs could finally have their cases heard on their merits. See ***Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency***, 911 F.2d 1331 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991) [***"TSPC I"*** -- the Nevada-side case]; and ***Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency***, 938 F.2d 153 (9th Cir. 1991) [***"TSPC II"*** -- the California-side case].[3]

Following the remand to the two district courts from the Ninth Circuit in ***TSPC I*** and ***TSPC II***, the cases were then consolidated for further hearing and proceedings in the Nevada District Court.[4] Thereafter, with the permission of

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[3] The factual and procedural background of these cases is further summarized in ***TSPC I***, 911 F.2d 1331, 1333-4, and ***TSPC II***, 938 F.2d 153, 154, n.1, and at length in the separate First Amended Complaints filed by the Nevada-side plaintiffs on October 28, 1991 (C.R. 117) and the California-side plaintiffs on March 27, 1992 (C.R. 135a). Each Complaint also had appended separate detailed Appendices setting forth the specific factual allegations applicable to each named-plaintiff and their property at issue. Also see the Petition for Writ of Certiorari and Response thereto previously filed with this Court (No. 90-1212), and denied at 499 U.S. 943 (1991).

[4] Upon remand from the Ninth Circuit following its rulings in ***TSPC I*** and ***TSPC II***, the parties agreed that it was desirable and proper to consolidate the two cases for all further proceedings

the respective district courts, the plaintiffs duly amended their Complaints to conform to the Ninth Circuit's holdings and to update their allegations in light of subsequent events.[5] Subsequently, their First Amended Complaints were again met with motions to dismiss by the petitioners TRPA and its two partner states, this time primarily based on newly-asserted statute of limitations defenses.

On December 9, 1992, the Nevada District Court issued its twin Orders (808 F.Supp. 1474 reproduced in the Append. to Pet., pp. 9a-29a; and 808 F.Supp. 1484 at Append. to Pet., pp. 30a-48a) dismissing all claims of plaintiffs. It did so after considering only the briefs of the parties, and without affording the plaintiffs an opportunity for oral argument. In doing so, the District Court decided

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before a single district court. The cases were thereafter so consolidated before the District Court for Nevada in Reno by its Order entered on February 21, 1992, after both district judges determined that Senior District Judge Edward C. Reed should most appropriately be the judge to handle these consolidated cases. (C.R. 132.)

[5] Each Amended Complaint, after updating the pertinent factual allegations and adding allegations regarding the *effects* of the 1987 Plan in extending the period of the takings, set forth three separate Claims for Relief: a First Claim seeking Just Compensation under the Fifth and Fourteenth Amendments for those plaintiffs owning properties designated by TRPA as "stream environment zone" properties; a Second Claim seeking Just Compensation under the Fifth And Fourteenth Amendments for those plaintiffs owning so-called "Class 1, 2, and 3" environmentally-sensitive lots; and a Third Claim on behalf of all plaintiffs seeking Just Compensation and other related damages pursuant to 42 U.S.C. §§ 1983 and 1985 of the Federal Civil Rights Act.

to break the continuum of TRPA's regulatory actions into four distinct, bite-size pieces, and chose to separately analyze and address each piece as follows:

> (1) As to the impact of the initial Interim Ordinance 81-5, which the district court found was in effect from June 25, 1981 to August 28, 1983, the district judge concluded any claims arising from that "interim measure" were time-barred based on the 60-day statute of limitations imposed by Art. VI(j)(4) of the TRPA Compact, and that the plaintiffs should not have waited until that interim measure became "final" in 1984 before initiating its lawsuit.
>
> (2) As to the impact of TRPA's temporary Resolution 83-21, which imposed an additional 8-month interim moratorium immediately following Ordinance 81-5, the district court also found any claims arising therefrom were time-barred based on the same 60-day statute of limitations set forth in TRPA's Compact.
>
> (3) As to claims arising from TRPA's adoption of its 1984 Plan, the district judge in three short sentences, without further analysis, and without addressing the legal authorities or analysis offered by the plaintiffs in their brief, found that the plaintiffs' claims arising from the 1984 Plan "failed for lack of causation" based on the separate federal court injunction that in part prevented TRPA from fully implementing its 1984 Plan as to other properties (not plaintiffs' properties) in the Tahoe Basin, and were therefore dismissed.

(4) As to plaintiffs' allegations in their First Amended Complaints that TRPA's 1987 Plan (adopted in the midst of this litigation and while the matter was pending on appeal before the Ninth Circuit) on its face continued in full force and effect the same prohibitions set forth in TRPA's 1984 Plan precluding any reasonable use of plaintiff's property, the district court found the plaintiffs were precluded from amending their Complaints on remand to address the ***effect*** of the 1987 Plan on their original takings claims. It further found that the plaintiffs' failure to file new Complaints challenging that 1987 Plan in the midst of this litigation within the 60-day statute of limitations now barred them from asserting claims addressing the ***effect*** of that 1987 Plan on their pending claims.

In brief, after a decade of litigation, rather than affording the plaintiffs the opportunity to have their cases heard on the merits -- as so clearly they are entitled to do pursuant to ***TSPC I, TSPC II, First English Evangelical Lutheran Church v. County of Los Angeles***, 482 U.S. 804 (1987), and ***Lucas v. So. Carolina Coastal Commission***, ____ U.S. ____, 112 S.Ct. 2886 (1992) -- the district court summarily shut and locked the courthouse door, again compelling the plaintiffs to seek relief from the Ninth Circuit.

Thereafter, the matter was fully briefed and argued to the Ninth Circuit, which filed its Opinion on August 10, 1994 [***TSPC III***] (34 F.3d 753 (9th Cir. 1994)), reproduced in the Append. to Pet., 1a-6a.). Again, the Ninth Circuit reversed the district court in significant part, finding that plaintiffs' "takings claims" predicated upon 42 U.S.C. § 1983 were ***not*** time barred, nor were its claims against the

1984 Regional Plan properly dismissed based on the alleged lack of causation.

As to the argument raised before the Ninth Circuit primarily by the State of California that the TRPA Compact's 60-day statute of limitations served as a time bar to the plaintiffs' claims pursued under 42 U.S.C. § 1983, the Ninth Circuit quickly cut to the chase and found that TRPA's 60-day statute of limitations was "obviously" not the requisite statute of limitations applicable to plaintiffs' § 1983 claims under this Court's decision in ***Wilson v. Garcia***, 471 U.S. 261 (1985). Because the petitioners (TRPA and the two states) had not pled nor argued any other statute of limitations except TRPA's 60-day statute of limitations, and because the Ninth Circuit had found that the Compact's 60-day statute of limitations was inapplicable to bar plaintiffs' claims brought under § 1983, the Ninth Circuit concluded that no parts of the plaintiffs' § 1983 claims were in fact time barred, thus clearing the way for the plaintiffs to proceed to trial on the merits as to their claims brought pursuant to 42 U.S.C. § 1983 for the takings triggered by TRPA's 1984 Plan, initiated by the predecessor interim moratoria, and extended by the subsequently-adopted 1987 Plan.[6]

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[6] In 1992, the Ninth Circuit made it clear that the *exclusive* remedy for plaintiffs seeking relief under the takings provisions of the Fifth and Fourteenth Amendments was pursuant to a claim under 42 U.S.C. § 1983, and that such a takings claim could not be pursued directly under the Fifth and Fourteenth Amendments to the Constitution. ***Azul-Pacifico, Inc. v. City of Los Angeles***, 973 F.2d 704 (9th Cir. 1992), cert. den., ____ U.S. ____, 113 S.Ct. 1049 (1993). This decision effectively made plaintiffs' Third Claim for Relief (its § 1983 Claim) the only operative claim for Just Compensation under the Constitution.

Further, while the plaintiffs had briefed at length their contentions before the Ninth Circuit that they properly withheld their fire until 1984 when TRPA first "made permanent" its predecessor temporary prohibitions, and that under well-established law finding its genesis in ***United States v. Dickinson***, 331 U.S. 745 (1947), property owners were not required to resort to piecemeal or premature litigation in pursuing a takings claim until the situation had sufficiently stabilized, and while the plaintiffs had further argued at length that their lawsuits had been timely filed and pursued based on other well-established law, the Ninth Circuit found it did not need to address nor pass upon those contentions. Rather, because the petitioners singularly defended against the § 1983 claims related to the 1981 Ordinance, the 1983 Resolution, and the 1987 Plan based only on the 60-day statute of limitations found in its Compact, and because the Ninth Circuit found that statute was not applicable to bar plaintiffs' § 1983 claims, the Ninth Circuit properly concluded that "[n]o part of TSPC's § 1983 claim is time-barred." Append. to Pet., p. 6a.

Again, TRPA and its partner states dug in their heels. Again, they unsuccessfully petitioned for rehearing and hearing *en banc* before the Ninth Circuit, and when that relief was denied, they filed the instant Petition with this Court seeking to have the determinations of the Ninth Circuit reviewed and reversed by this Court.

II

SUMMARY OF ARGUMENT

The thrust of petitioners' argument to this Court goes like this -- the so-called 60-day statute of limitations found in TRPA's Compact is allegedly "clear and unambiguous"; Congress' "consent" to the bi-state Compact transformed this statute of limitations into a "Federal law"; as such, TRPA's 60-day statute of limitations is now the controlling statute of limitations under this Court's decision in ***Wilson v. Garcia***, ***supra***, as to claims filed under 42 U.S.C. § 1983 against TRPA alleging a regulatory taking and seeking Just Compensation under the Constitution; and plaintiffs' § 1983 claims, which alleged a continuum of actions over a period of years, should in fact be carved up into bite-size pieces just as was done by the district court, and each bite-size piece dismissed where it is shown that the plaintiffs did not file a new lawsuit against TRPA within 60-days after TRPA enacted each ***temporary*** moratorium or extended that moratorium during the pendency of this litigation. To muddy the waters further, the petitioners now contend that somehow their novel approach to creating and applying such a truncated statute of limitations for § 1983 takings claims is in fact "in conflict" with the decisions of other Circuits -- in spite of the fact that no other Circuit has ever addressed such an idea, nor in any way reached a decision even remotely in conflict with the decision of the Ninth Circuit in the instant case.

The fatal flaw in this entire approach, as the Ninth Circuit so quickly discerned, is that the 60-day statute of limitations set forth in TRPA's Compact neither purports to nor does it in fact deal with takings claims brought pursuant to 42 U.S.C. § 1983 under the Fifth and Fourteenth

Amendments, nor can it seriously be contended that the mere "consent" to the Compact by the Congress somehow transformed that 60-day statute of limitations into a new Federal law that should now be viewed as the guiding beacon in determining timeliness of claims brought under § 1983. At best, petitioners have only been able to point to other patently inapplicable bi-state compact cases dealing tangentially with non-related statute of limitations issues -- but certainly no case in any way even remotely suggesting that such a 60-day statute of limitations embedded in a bi-state compact is in fact dispositive as a time-bar in terms of property owners bringing a regulatory takings claim pursuant to § 1983 to obtain Just Compensation under the Fifth and Fourteenth Amendments.

III

REASONS FOR DENYING THE WRIT

A. The TRPA Compact's 60-Day Statute of Limitations is Clearly Inapplicable on its Face to § 1983 Claims

The 60-day statute of limitations found in TRPA's Compact, which the petitioners contend is so unambiguous and obviously controlling, reads in pertinent part as follows:

> Art. VI(j)(4): "A legal action arising out of the adoption or amendment of the regional plan or of any ordinance or regulation of the agency. . . shall be commenced within 60-days after final action by the agency. . ."

On its face, this Compact statute of limitations hardly purports to address or even suggest that it is a time-bar as to

claims brought against TRPA arising out of the denial of Just Compensation protections of the Fifth and Fourteenth Amendments, nor as to claims seeking redress under those Constitutional provisions brought pursuant to § 1983 of the Federal Civil Rights Act.

Clearly, the claims of the plaintiff-property owners seeking Just Compensation for the taking of their private property pursuant to the Fifth and Fourteenth Amendments are not *per se* claims "arising out of the adoption" of the regulations as such, but are in fact claims arising out of TRPA's failure to provide the plaintiffs constitutionally-mandated Just Compensation following the taking of their property. As the plaintiffs argued to the Ninth Circuit, "the nature of the right sued upon . . . determines the limitations period." ***Edwards v. Fresno Community Hospital***, 38 Cal.App.3d 702, 704 (1974); *see also*, ***American Pipe and Const. Co. v. Utah***, 414 U.S. 538 (1974). In this case, the right sued upon is the right to Just Compensation following the taking. Surely Art. VI(j)(4) of TRPA's Compact on its face makes no attempt to create a 60-day time bar to such claims seeking Just Compensation brought pursuant to the Federal Civil Rights Act.

Nor, after more than ten years of hard fought litigation, have any of the petitioners been able to point to any scintilla of legislative history that suggests that when the California and Nevada Legislatures amended the current TRPA Compact in 1980, nor for that matter when Congress acted to grant its consent to those amendments in late 1980, any member of either Legislature or the Congress ever suggested that the 60-day statute of limitations being inserted in the Compact was intended to impose such an unusually short statute of limitations for aggrieved citizens to pursue their constitutional claims for Just Compensation under the

Constitution. The fact is there is no such legislative history because neither the Legislatures of California or Nevada, nor the Congress, ever considered nor intended that the 60-day statute of limitations would ever be so construed. Only the attorneys now defending TRPA's total proscriptions on use of private property have belatedly found such new enlightenment, contending for the first time that the Compact's 60-day statute of limitations should now be construed as the new definitive Federal law applicable to the initiation of claims brought pursuant to § 1983 by property owners asserting that their property has been "taken for public use without just compensation".

B. The Ninth Circuit Properly Found the Compact's 60-Day Statutes of Limitations Should Not be Applied to Bar Each Bite-Size Piece of the Plaintiffs' Takings Claim

The petitioners -- TRPA and the Attorneys General of the two states -- do not stop there. Should they be successful in their quest to have new meaning read into the Compact's 60-day statute of limitations, it necessarily follows that they will then seek to have the Court divide the entire continuum of takings alleged in the Complaints into distinct bite-size pieces -- just as they were able to persuade the district court to divide the takings claims into such discrete pieces -- and then apply the 60-day statute of limitations to each such piece.

As the Ninth Circuit in ***TSPC I*** correctly recognized, the plaintiffs' original Complaints were indeed focused on the ***permanent*** prohibitions contained in the 1984 Plan which "made permanent" the similar "interim" prohibitions contained in Ordinance 81-5 and the 8-month follow-up moratorium imposed by TRPA in 1983. But when these

interim measures were made permanent by the adoption of TRPA's 1984 Plan, and that 1984 Plan converted the interim planning moratorium into a permanent prohibition on any use of plaintiffs' properties triggering this legal challenge, the petitioners say in effect: Gotcha -- you're too late to challenge our interim planning moratorium. But if you had sued us when we first adopted Ordinance 81-5 or extended the moratorium for eight months in 1983, we would have asserted you were premature, as those were only interim measures that did not constitute ***final*** action.[7]

But if the petitioners are successful in their quest to invoke TRPA's 60-day statute of limitations as applied to plaintiffs' § 1983 claims, necessarily they will then urge that each discrete element of the takings claims must be independently and separately analyzed for purposes of the 60-day statute of limitations. To do so, they must also conveniently overlook the well-established body of law that has long dispensed with such procedural rigidity in inverse condemnation cases. Thus, nearly 50 years ago, in ***United States v. Dickinson***, 331 U.S. 745, 749 (1947), a case involving an inverse condemnation claim, this Court held that "***the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really 'taken'.***" Instead, Justice Frankfurter, speaking for a unanimous Supreme Court, stated:

> The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding

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[7] Even the very 60-day statute of limitations the petitioners contend is applicable to the plaintiffs' takings claims makes it clear that it does not commence to run until "60-days after ***final*** action by the agency."

> "causes of action" -- when they are born, whether they proliferate, and when they die. We are not now called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. If suit is brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him -- for instance, the uncertainty of damage and the risk of *res judicata* against recovering later damage as yet uncertain. * * * And as there is nothing in reason, so there is nothing in legal doctrine to preclude the law from meeting such a process by postponing the suit until the situation becomes stabilized. *Id.* at 748-749.

In ***Dickinson***, the Supreme Court established the rule in inverse condemnation actions that the landowner need not bring an action until the situation has "sufficiently stabilized", particularly in circumstances such as the instant case in which the facts giving rise to the alleged taking are in the nature of a continuum of governmental regulatory enactments. This principle has been repeated in numerous inverse condemnation cases where the landowners was allowed to wait until the situation became stabilized, and the damages certain, before bringing suit. ***See, e.g.***, the leading California case of ***Pierpont Inn, Inc. v. State of California***, 70 Cal.2d 282, 294 (1969); ***Gordon v. City of Warren***, 579 F.2d 386, 391 (6th Cir. 1978); and ***Lockary v. Kayfetz***, 587 F.Supp. 631, 635-6 (N.D.Cal. 1984).

It would make little sense to require plaintiffs to file suit immediately upon the adoption of ***temporary*** bans on development, particularly where more permanent measures are being debated and were expected to supersede those temporary measures in the near future. Further, as far as the plaintiffs were aware, the interim moratorium imposed by TRPA could have been suspended at any time. If the moratorium were lifted relatively promptly, the plaintiffs might well have chosen not to pursue their judicial remedies.

Under these circumstances, the law should and does encourage potential plaintiffs to adopt a "wait-and-see" attitude. Only when the situation ***stabilizes*** in the form of a permanent and final determination by a regulatory agency does it make sense to require the plaintiffs to decide whether to resort to litigation. A rule requiring the plaintiffs to file suit within 60 days of the adoption of any temporary moratorium and at a time when it is unclear just how long that temporary moratorium might last, would only encourage premature and possibly unnecessary litigation, and flies in the face of the settled principle first articulated by Justice Frankfurter in ***Dickinson***.[8]

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[8] When the instant lawsuits were originally filed in 1984, a body of case law also clearly suggested that "interim" land use moratoria were not subject to immediate judicial challenge. In fact, this is the very position that was repeatedly argued and asserted by the petitioners in their earlier briefs to the Ninth Circuit in this case.

> Numerous federal and state court decisions have upheld the power of agencies to impose interim land use prohibiting all development for a temporary period -- measures more restrictive than the regulatory program at issue herein. (Numerous citations omitted.)

C. The Compact's 60-Day Statute of Limitations is Not the *Single* Statute of Limitations Applicable to *All* § 1983 Claims As Mandated by *Wilson v. Garcia*

The petitioners would also have this Court find that TRPA's 60-day statute of limitations must be viewed as the controlling "federal law" based merely on Congress' action in ratifying the amended Compact containing that limitations provision. Then, turning their attention to this Court's holding in ***Wilson v. Garcia***, *supra*, the petitioners would ask this Court to create an entirely new doctrine -- that while recognizing there is now a ***single*** appropriate statute of limitations in each state applicable to ***all*** § 1983 claims, nevertheless in those small portions of each state covered by a bi-state planning compact, there should be a separate statute of limitations for § 1983 claims based upon whatever those two states determine is appropriate in that small portion of their states affected by that compact. In this case, the argument goes, the citizens who own private property within the comparatively small jurisdictional area covered by the TRPA in both the States of Nevada and California should be treated entirely differently than all other property owners in those two states. Thus, in lieu of the single statewide statute of limitations now applicable to § 1983 claims brought anywhere else in California or Nevada pursuant to ***Wilson v. Garcia***, the petitioners contend that the TRPA Compact's truncated 60-day statute of limitations should be applicable to private property owners only in the Tahoe Basin.

Continued:

See, California's Brief before the Ninth Circuit in ***TSPC I***, filed on April 17, 1987, at p. 22.

Again, this argument entirely misses the mark. First, as this Court has previously found in ***Lake Country Estates v. TRPA***, 440 U.S. 391 (1979), and most recently addressed in ***Hess v. Port Authority Trans-Hudson Corporation***, ___ U.S. ___, 115 S.Ct. 394 (1994), a bi-state compact between two states is just that -- a compact between the two states that requires congressional "consent" or ratification before it takes effect (Const. Art. I, § 10). That does not automatically transform it into some form of higher federal law that supersedes or transcends the state interests involved. (See the helpful discussion of bi-state compacts and entities set forth in ***Hess, supra,*** at 400-401.) While it goes beyond the scope of this brief response to address this issue at length, suffice it to say that this Court has previously found in ***Lake Country Estates, supra,*** that the TRPA is still very much a creature of the States of California and Nevada, that the TRPA Governing Board and that agency's financing are almost exclusively controlled by the two states, and that when TRPA undertakes regulatory enactments, it does so "under color of state law" as that term is used in 42 U.S.C. § 1983. Thus, § 1983 has specifically been held to provide a remedy for individual property owners alleging the deprivation of their Constitutional rights by actions taken by the TRPA. It therefore would hardly make sense to deviate from the clear guidance set forth in ***Wilson v. Garcia*** that in each state, "one most appropriate statute of limitations for all § 1983 claims" be selected in view of the "federal interests in uniformity, certainty, and minimization of unnecessary litigation". 471 U.S. at 275.

The Ninth Circuit, in a series of cases subsequent to ***Wilson v. Garcia***, clearly spelled out that singular applicable statute of limitations. Thus, at the time this case was originally filed in June, 1984, the single statute of limitations applicable to all § 1983 cases in ***both*** California and Nevada

was three years. ***Gibson v. United States***, 781 F.2d 1334 (9th Cir. 1986) applicable to California; ***Mason v. Schaub***, 564 F.2d 308 (9th Cir. 1977) applicable to Nevada. The fact is that the plaintiffs' Complaints, originally filed on June 25, 1984, were filed within three years of the date of adoption of Ordinance 81-5, the earliest of the interim moratoria, even if it is necessary to apply the applicable § 1983 statute of limitations to each individual enactment.[9]

As the Ninth Circuit perceptively noted, TRPA and its two partner states are not now arguing that these lawsuits were not timely filed nor pursued under the singular statute of limitations applicable to § 1983 claims otherwise applied throughout the remainder of California and Nevada based on well-established precedents. Rather, they simply contend that in lieu of that single statute of limitations mandated by ***Wilson v. Garcia***, the Compact should be viewed as creating a new federal law that creates an entirely distinct statute of limitations applicable only to § 1983 cases brought against TRPA. That, of course, flies in the face of the mandate of ***Wilson v. Garcia*** to create a *single* statute of limitations in each state applicable to *all* § 1983 claims without reference to where they arise in each state.

---

[9] Petitioners also point out that as to § 1983 cases filed ***after*** the decision in ***Wilson v. Garcia*** in 1985, there is now a different statute of limitations in California (one year), as contrasted with a two-year statute in Nevada. That necessarily follows from the dictates of ***Wilson v. Garcia*** that there be a single, most applicable statute in ***each*** state. That certainly is no reason to compound these already existing differences by having still a third limitations period in the Tahoe Basin. To reiterate, this is not an issue joined in this litigation, as it is undenied that the operative statute of limitations for § 1983 claims in ***both*** California and Nevada was three years at the time these cases were filed.

D. The Purported Conflict with Other Circuit Court Decisions is Simply Made of Whole Cloth

The petitioners' attempt to create a "conflict" between the Circuits -- when in fact none whatsoever exists -- must be seen for what it truly is, simply a wild stretch of the advocate's imagination. The fact is there is no such "conflict", as indeed no other Circuit has had the occasion to rule on such an issue, and no other bi-state agency except TRPA has ever hidden behind such a patently brief 60-day statute of limitations to try to protect itself from claims of regulatory takings pursued under § 1983.

At best, the petitioners have simply been able to point to two unrelated series of lawsuits dealing with entirely separate issues. The first arose from the district courts in New Jersey and the Eastern District of New York, was then heard by the Third Circuit (8 F.3d 811 (3d Cir. 1993)), and ultimately was addressed by this Court last term in ***Hess v. Port Authority Trans-Hudson Corporation***, *supra*. In *Hess*, of course, the issue was entirely different than the one at bar. It had absolutely nothing to do with the applicable statute of limitations to be applied to § 1983 takings claims for Just Compensation brought against a bi-state agency, nor anything remotely resembling the applicability of a 60-day statute of limitations purporting to bar such claims. Rather, those cases dealt with the claims of injured employees of the subsidiary agency of the bi-state authority created by bi-state compact, and the Eleventh Amendment immunity being asserted by the bi-state authority.

Try as we may, we cannot conceive of how that litigation somehow addresses or deals with issues even remotely comparable to the ones at bar -- that is, the interpretation of TRPA's 60-day statute of limitations

provision and the applicability of that provision to § 1983 claims being pursued to seek Constitutionally-mandated Just Compensation for a regulatory taking.

The petitioners also point to an older decision of the District Court for the Eastern District of New York affirmed by the Second Circuit in ***Rao v. Port of New York***, 222 F.2d 362 (2d Cir. 1955). Again that litigation dealt not with a § 1983 claim, but with an Eleventh Amendment issue: whether the Eleventh Amendment immunities afforded to the States of New York and New Jersey also extended to the bi-state Port Authority, and other unrelated procedural issues. However, nothing in that New York litigation addressed nor dealt with the issue before the Ninth Circuit, that is the applicable statute of limitations for claims seeking Just Compensation for regulatory takings brought against a bi-state agency.

Even a cursory reading of the Ninth Circuit's decision in the instant case makes it abundantly clear that it was addressing a narrow issue: whether TRPA's 60-day statute of limitations, on its face or construed under applicable case law, should be applied to bar § 1983 claims brought for failure to provide Just Compensation under the Fifth and Fourteenth Amendments. As such, the Ninth Circuit necessarily addressed the holding of this Court in ***Wilson v. Garcia***, *supra*, that made it abundantly clear there was to be a *single* statute of limitations to be applied in each state applicable to *all* § 1983 claims. Certainly, the issue addressed by the Ninth Circuit in the instant litigation is entirely different and distinct from the issues raised in the New York-New Jersey Port Authority litigation. In brief, it strains all reason to now suggest that somehow that entirely differing appellate litigation has created an inter-Circuit conflict warranting intervention by this Court.

IV

CONCLUSION

For the foregoing reasons, the respondents respectfully request that this Court either summarily affirm the Ninth Circuit's decision in this case, or in the alternative, deny the Petition for Writ of Certiorari.

DATED: February 28, 1995.

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October Term, 1994

STATE OF CALIFORNIA, STATE OF NEVADA AND TAHOE REGIONAL PLANNING AGENCY,

Petitioners,

v.

TAHOE SIERRA PRESERVATION COUNCIL, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Page

I. THIS CASE PRESENTS A DIRECT INTER-CIRCUIT CONFLICT REGARDING THE APPROPRIATE STATUTE OF LIMITATIONS TO BE APPLIED IN LITIGATION ARISING UNDER AN INTERSTATE COMPACT 1

II. CONTRARY TO RESPONDENTS' CLAIMS, THE TAHOE REGIONAL PLANNING COMPACT'S 60-DAY STATUTE OF LIMITATIONS IS DIRECTLY APPLICABLE IN THIS LITIGATION 3

III. RESPONDENTS INEXPLICABLY CONFUSE PRINCIPLES APPLICABLE TO "PHYSICAL INVASION" CASES WITH THE DISTINCT RULES PERTAINING TO REGULATORY TAKINGS LITIGATION SUCH AS THE PRESENT ACTIONS 5

IV. RESPONDENTS MISPERCEIVE *WILSON V. GARCIA*'S APPLICABILITY TO THE PRESENT CASE 7

TABLE OF AUTHORITIES

Page

CASES

American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) 4

Culyer v. Adams, 449 U.S. 433 (1981) 7

DeAnza Properties X, Ltd. v. County of Santa Cruz, 936 F.2d 1084 (9th Cir. 1991) 6

DelCostello v. Teamsters, 462 U.S. 151 (1983) 7

Edwards v. Fresno Community Hospital, 38 Cal.App.3d 702, 113 Cal.Rptr. 579 (1974) 4

Gibson v. United States, 781 F.2d 1334 (9th Cir. 1986) 8

Harper v. Virginia Dept. of Taxation, ___ U.S. ___, 113 S.Ct. 2510 (1993) 8

Hensler v. City of Glendale, 8 Cal.4th 1, 876 P.2d 1043, 32 Cal.Rptr. 244 (1994), cert. denied ___ U.S. ___, 63 U.S.L.W. 3628 (1995) 4, 6

Hess v. Port Authority Trans-Hudson Corp., ___ U.S. ___, 115 S.Ct. 394 (1994) 1, 2

Hess v. Port Authority Trans-Hudson Corp., 809 F.Supp. 1172, aff'd, 8 F.3d 811 (3d Cir. 1994) 2

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S.Ct. 2439 (1991) 8

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 6

Mason v. Schaub, 564 F.2d 308 (9th Cir. 1977) 8

Ocean Acres Ltd. Partnership v. Dare County Bd. of Health, 707 F.2d 103 (4th Cir. 1983) 6

TABLE OF AUTHORITIES – Continued

Page

Patrick Media Group, Inc. v. California Coastal Commission, 9 Cal.App.4th 592, 11 Cal.Rptr.2d 824 (1993) 6

Petty v. Tennessee-Missouri Bridge Comm., 359 U.S. 275 (1959) 7

Pierpont Inn, Inc. v. State of California, 70 Cal.2d 282, 449 P.2d 737, 74 Cal.Rptr. 521 (1962) 5

Rao v. Port of New York, 122 F.Supp 595 (E.D.N.Y. 1954), aff'd, 222 F.2d 363 (2d Cir. 1955) 2, 3

United States v. Dickinson, 331 U.S. 745 (1947) 5

Walsh v. Port Authority Trans-Hudson Corp., 813 F.Supp. 1095 (D.N.J. 1993), aff'd sub nom. 8 F.3d 811 (3d Cir. 1993) 2

Wilson v. Garcia, 471 U.S. 261 (1985) 7, 8

Yee v. City of Escondido, 503 U.S. 519, 112 S.Ct. 1522 (1992) 5

UNITED STATES CONSTITUTION

Eleventh Amendment 7

STATUTES

Title 42, United States Code § 1983 .....7, 8

Central Interstate Low-Level Radioactive Waste Compact, P.L. 99-240, Article IV(l) (1986) 3

Central Midwest Interstate Low-Level Radioactive Waste Compact, P.L. 99-240, Article III(q) (1986) 3

Columbia River Gorge Compact, 16 U.S.C. § 544m(b)(4) (1986) 3

TABLE OF AUTHORITIES – Continued

Page

Federal Employers' Liability Act, 45 U.S.C. § 56..... 2

Midwest Interstate Low-Level Radioactive Waste Compact, P.L. 99-240 (1986), Article III(o)..... 3

Northeast Interstate Low-Level Radioactive Waste Management Compact, P.L. 99-240 (1986), Article IV(o)..... 2

Tahoe Regional Planning Compact, Article VI(j)(4)..... 3

OTHER AUTHORITIES

Federal Rules of Civil Procedure, Rule 23..... 4

Schwartz & Kirklin, Section 1983 Litigation: Claims, Defenses and Fees, § 12.10 (John Wiley & Sons, 2d ed.) (1994 Supp.)..... 8

PETITIONERS' REPLY BRIEF

I.

THIS CASE PRESENTS A DIRECT INTER-CIRCUIT CONFLICT REGARDING THE APPROPRIATE STATUTE OF LIMITATIONS TO BE APPLIED IN LITIGATION ARISING UNDER AN INTERSTATE COMPACT.

Respondents maintain that the decision below fails to present a conflict with the decisions of any other circuit. (Brief in Opposition at 21-22.) Respondents' view is wholly inaccurate.

The first question presented in the Petition is "[w]hether, in litigation brought under an interstate compact to challenge government regulations adopted under the terms of that compact, the applicable limitations period should be drawn from the express provisions of the compact itself rather than from other state or federal law." (Petition at i.) Respondents, significantly, have not seen fit to take issue with or attempt to re-frame that question in their Brief in Opposition.

Respondents have apparently misread the authorities from the Second and Third Circuits cited by Petitioners. As noted in the Petition, a principal source of the current inter-circuit conflict is the litigation which culminated in *Hess v. Port Authority Trans-Hudson Corp.*, ___ U.S. ___, 115 S.Ct. 394 (1994). Respondents are correct in noting that this Court's decision in *Hess* dealt exclusively with an issue (i.e., the Eleventh Amendment) separate and apart from the statute of limitations question. What respondents overlook, however, is the fact that the antecedent decisions of the district courts, affirmed by the Court of

Appeals for the Third Circuit, *did* address the same statute of limitations issue raised in Petitioner's first Question Presented. (*Walsh v. Port Authority Trans-Hudson Corp.*, 813 F.Supp. 1095 (D.N.J. 1993), *aff'd sub nom.*, 8 F.3d 811 (3d Cir. 1993); *Hess v. Port Authority Trans-Hudson Corp.*, 809 F.Supp. 1172, *aff'd*, 8 F.3d 811 (3d Cir. 1994).) Moreover, both courts resolved the issue directly contrary to the decision of the Ninth Circuit, i.e., by adhering to the one-year limitations period expressly contained in the interstate compact and by rejecting the argument that another, lengthier federal statute of limitations should be applied due to the nature of the cause of action there sued upon (the Federal Employers' Liability Act, 45 U.S.C. § 56).

Respondents' efforts to distinguish away the decision in *Rao v. Port of New York*, 122 F.Supp 595, 597 (E.D.N.Y. 1954), *aff'd*, 222 F.2d 363 (2d Cir. 1955), are equally unavailing. While the Eleventh Amendment was again one issue presented in *Rao*, the other key question adjudicated there – the one which places the Second Circuit squarely in conflict with the Ninth Circuit – is whether the bistate compact's express 12-month statute of limitations supersedes a longer limitations period sought to be imported from sources external to the compact itself.[1]

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[1] Respondents repeatedly suggest that the Tahoe Regional Planning Compact's 60-day statute of limitations is unique in its brevity, and therefore presents some type of legal aberration. Any such perception is demonstrably incorrect. Many of the other interstate compacts potentially affected by the decision below, particularly those of recent vintage, similarly have comparably short limitations periods. See, e.g., Northeast Interstate Low-Level Radioactive Waste Management Compact, P.L.

Like the Third Circuit, and contrary to the Ninth Circuit, the Second Circuit answered that question in the affirmative in *Rao*. (222 F.2d at 363.)

Respondents' efforts to evade the inter-circuit conflict presented with respect to Petitioners' first Question Presented are therefore without merit.

II.

CONTRARY TO RESPONDENTS' CLAIMS, THE TAHOE REGIONAL PLANNING COMPACT'S 60-DAY STATUTE OF LIMITATIONS IS DIRECTLY APPLICABLE IN THIS LITIGATION.

Respondents further contend that the 60-day statute of limitations expressly set forth in the bistate Tahoe Regional Planning Compact is "clearly inapplicable" to their regulatory takings claim. (Brief in Opposition at 12-13.) That view is singularly incorrect, as demonstrated by the plain language of the Compact itself.

Article VI(j)(4) *expressly provides* that *any* "legal action arising out of the adoption . . . [of TRPA's] regional plan or of any ordinance . . . shall be commenced within 60 days . . . " Respondents have, in fact, brought a facial

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99-240 (1986), Art. IV(o) (60-day statute of limitations); Midwest Interstate Low-Level Radioactive Waste Compact, P.L. 99-240 (1986), Art. III(o) (same); Columbia River Gorge Compact, 16 U.S.C. § 544m(b)(4) (1986) (60-day limitations period for litigation brought under Oregon-Washington compact modelled on Tahoe Regional Planning Compact); Central Interstate Low-Level Radioactive Waste Compact, P.L. 99-240, Art. IV(l) (1986) (60 days); Central Midwest Interstate Low-Level Radioactive Waste Compact, P.L. 99-240, Art. III(q) (1986) (same).

challenge to the validity of TRPA's regional plan and certain precursor ordinances. It is difficult to comprehend a lawsuit which more directly implicates the Compact's stated limitations period than does the present litigation.

Recently, a unanimous California Supreme Court rejected precisely the same theory advanced by respondents here. In *Hensler v. City of Glendale*, 8 Cal.4th 1, 876 P.2d 1043, 32 Cal.Rptr. 244 (1994), *cert. denied*, ___ U.S. ___, 63 U.S.L.W. 3628 (1995), a landowner unsuccessfully sought to evade application of a relatively short state statute of limitations pertaining to litigation challenging local land use decisions. The court in *Hensler* spurned the landowner's claim that inverse condemnation claims were somehow exempt from the statutory limitations period, finding that period applicable no matter what the form of the action. (8 Cal.4th at 21-28, 876 P.2d at 1056-1061.)[2]

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[2] Respondents' citations to the contrary are unpersuasive. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), dealt simply with the relationship between a federal antitrust statute of limitations and the class action rules set forth under Rule 23 of the Federal Rules of Civil Procedure. *Edwards v. Fresno Community Hospital*, 38 Cal.App.3d 702, 113 Cal.Rptr. 579 (1974), concerned the applicable state limitations period in private litigation over a hospital's revocation of a doctor's use privileges. The California court of appeal there held that the revocation implicated a "property right" rather than a "personal right" for state law limitations purposes. And in *Hensler, supra*, the California Supreme Court recently invoked the same rule cited by Respondents in *Edwards* to find a 90-day statute of limitations for litigation challenging government land use decisions fully applicable to a landowner's regulatory takings claim. 8 Cal.4th at 22-27, 876 P.2d at 1057-1061.

III.

RESPONDENTS INEXPLICABLY CONFUSE PRINCIPLES APPLICABLE TO "PHYSICAL INVASION" CASES WITH THE DISTINCT RULES PERTAINING TO REGULATORY TAKINGS LITIGATION SUCH AS THE PRESENT ACTIONS.

Respondents attempt to bolster their arguments by relying on procedural rules developed by this and lower federal and state courts to adjudicate cases involving "physical invasions" of private property under the Takings Clause. (Brief in Opposition at 14-17.) In doing so, however, respondents overlook the fact that those principles are simply inapplicable to cases – such as the present litigation – involving facial claims of unconstitutional takings of property attributable to purely regulatory action.

This Court recently underscored that point in *Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522 (1992). There the Court unanimously held that principles applicable to physical takings claims could not be simply imported into the distinct rules pertaining to regulatory takings law, given the critical analytical distinctions between the two doctrines. (112 S.Ct. at 1526.)

Respondents' reliance on cases such as *United States v. Dickinson*, 331 U.S. 745 (1947) and *Pierpont Inn, Inc. v. State of California*, 70 Cal.2d 282, 449 P.2d 737, 74 Cal.Rptr. 521 (1962) is therefore fundamentally misplaced, inasmuch as those decisions deal with *physical* invasions of property.

In recent years, both state and federal courts have rejected the same argument posed by respondents herein:

that landowners should not be required to pursue their regulatory takings claims until the government conduct precipitating the claim has "sufficiently stabilized." The California Supreme Court expressly and unanimously rejected application of this theory to a regulatory takings case in *Hensler v. City of Glendale, supra,* 8 Cal.4th at 21-28, 876 P.2d at 1057-1061. (See also, *Patrick Media Group, Inc. v. California Coastal Commission,* 9 Cal.App.4th 592, 614-615, 11 Cal.Rptr.2d 824, 838 (1993) (finding *Dickinson* and *Pierpont Inn* inapposite to regulatory takings cases).) Federal courts have taken the same view, expressly rejecting the notion Respondents advance here. (*DeAnza Properties X, Ltd v. County of Santa Cruz,* 936 F.2d 1084, 1086-1087 (9th Cir. 1991); *Ocean Acres Ltd. Partnership v. Dare County Bd. of Health,* 707 F.2d 103, 105-106 (4th Cir. 1983).) And it is worthy of note that respondents' "sufficiently stabilized" theory is particularly inappropriate where – as here – they have chosen to pursue a *facial* takings claims to the regulations at issue. Under such circumstances, it is particularly unnecessary and nonsensical to defer litigation for some indeterminate period, since the legality of the regulations can be clearly measured at the time of their enactment. (See *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 494-497 (1987) (discussing facial regulatory takings challenges generally).)

IV.

RESPONDENTS MISPERCEIVE *WILSON v. GARCIA'S* APPLICABILITY TO THE PRESENT CASE.

Respondents' Brief in Opposition betrays a fundamental misunderstanding of *Wilson v. Garcia*, 471 U.S. 261 (1985), and that decision's application to the present litigation. First, without addressing or even mentioning the authorities cited in the Petition, respondents baldly maintain that the Tahoe Regional Planning Compact does not qualify as federal law. (Brief in Opposition at 18, 19.) But that claim is patently without merit, as even a cursory examination of this Court's precedents reveal. (E.g., *Culyer v. Adams*, 449 U.S. 433, 439-440 (1981); *Petty v. Tennessee-Missouri Bridge Comm.*, 359 U.S. 275, 278-279 (1959).)

Second, *Garcia* instructs that choice of the applicable statute of limitations to be applied in litigation brought under 42 U.S.C. section 1983 is a matter of *federal* law; only when federal law fails to establish a particular limitations period should the federal courts borrow a limitations period from the law of the state in which the court is located. (471 U.S. at 266-267; see also, *DelCostello v. Teamsters*, 462 U.S. 151, 171-172 (1983) (declining to apply state statute of limitations period in face of federal limitations period which better reflected interests likely advanced by Congress).) (Notably, the Brief in Opposition does not take direct issue with these principles; rather, respondents completely ignore them, choosing instead to cite to recent Eleventh Amendment decisions of this Court having no relevance to the statute of limitations question here at issue.)

Third and finally, since the 60-day limitations period contained in the Tahoe Regional Planning Compact indisputably constitutes federal law (see *supra*), the Ninth Circuit grievously erred by inexplicably failing to apply that provision to respondents' section 1983-based regulatory takings claim. Such an application is directly mandated under a proper construction of *Garcia*, contrary to respondents' apparent belief.[3]

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[3] Respondents further claim – for the first time before this Court – that all or portions of their inverse condemnation claims are subject to a *three-year* limitations period under *Garcia*. Brief in opposition at 19-20. This belated assertion is equally spurious. First, Respondents' reliance on *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986) and *Mason v. Schaub*, 564 F.2d 308 (9th Cir. 1977) seems misplaced, given this Court's subsequent "retroactivity" rulings in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534-544 (1991) and *Harper v. Virginia Dept. of Taxation*, ___ U.S. ___, 113 S.Ct. 2510, 2517 (1993). (On the general subject of *Garcia*'s retroactivity, see Schwartz & Kirklin, *Section 1983 Litigation: Claims, Defenses and Fees* § 12.10 (John Wiley & Sons, 2d ed.) (1994 Supp.).) Moreover, Respondents' bald statement that "it is undenied" that the operative statute of limitations for their section 1983 claim is three years (Brief in Opposition at 20, n.9) is simply untrue. To the contrary, Petitioners have consistently maintained throughout the course of the litigation that the Tahoe Regional Planning Compact's 60-day statute of limitations, ratified in 1980 by Congress as part of the Compact, is the proper limitations period to be applied in this case. Respondents themselves did not take issue with that point until they argued, for the first time in the Ninth Circuit, that a limitations period from some other source should be applied instead.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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